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RIGHTS OF JURIES

DEFENDED.

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THE
RIGHTS OF JURIES
DEFENDED.

TOGETHER WITH
AUTHORITIES OF LAW
IN SUPPORT OF THOSE RIGHTS.

AND THE
OBJECTIONS
TO
MR. FOX'S LIBEL BILL
REFUTED.

By CHARLES EARL STANHOPE, *K*
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THE
RIGHTS OF JURIES

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AUTHORITIES OF LAW
IN SUPPORT OF THESE RIGHTS

FOR THE PEOPLE



MR. FORTESCUE

BY CHARLES EARL STANNARD

PRINTED BY THE ROYAL SOCIETY AND OF THE
LAW AND SOCIETY OF THE ROYAL SOCIETY

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1844

RIGHTS OF JURIES.

A Constitutional Question of the highest importance has lately been agitated both in and out of Parliament, and the most opposite Opinions have been held upon the Subject. Those invaluable Rights of the People, the *Trial by Jury*, and the *Liberty of the Press*, have been in imminent Danger; and it has been deemed necessary to pass an Act of Parliament in order to secure them. Although the Danger seems to be thereby at present averted, there are *other* Means by which the same pernicious Principles that created the Alarm, may be carried into Effect.

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The Public, therefore, must be put upon their guard. The Chief Justice of the King's Bench has lately been defeated, as to his preposterous *Pretensions* respecting the Power of *Judges* ; but, who will answer that similar Pretensions will never be revived ?

It is proper that the Country at large, and particularly that those who are liable to be called upon to serve on Juries, should be acquainted with their Rights ; and when that Knowledge shall be universally diffused, our Liberties will be secure. A dispassionate Investigation of our Laws and Constitution is expedient at all Times ; but, after the Attacks that have been made upon the Conduct of those in Parliament, who have considered it as their Duty to support the *Libel Bill* of Mr. Fox, it becomes peculiarly proper to give to the Public, a fair Opportunity of comparing the Arguments in Support of that Bill, with those on the opposite Side of the Question. The enlightened Part of the Nation

tion will then judge, whether the House of Commons, and the Majority of the House of Lords, have meritoriously stood forth in the Defence of the most essential Rights of the People, or whether they have promoted (as it has been said) “ *the Confusion and Destruction of the Law of England.*”

The Object of the Act that I have mentioned is to remove ill-founded Doubts respecting the Functions of Juries in Cases of Libel; and to prevent a Practice from prevailing with respect to the Crime of *Libel*, which is contrary to the first Principles of our Criminal Law in all other Cases. That Act of Parliament does *not alter* the Law; but it confirms it, by condemning as *illegal* a Species of Direction to a Jury that *deserved* to be reprobated, and condemned.

It is thereby *declared* and enacted, that on every Trial for the making or publishing any *Libel*, the Jury may give a *General Verdict* of *Guilty* or *Not Guilty*, upon the *whole Matter*

put in Issue; and shall not be required or directed,
by the Court or Judge, to find the Defendant
or Defendants *Guilty, merely* on the Proof of
the *Publication* of the Paper charged to be a
Libel, and of the *Sense* ascribed to the same in
the Indictment or Information.

It will scarcely be believed by Posterity,
that at the End of the Eighteenth Century,
a System should have been attempted to be
established, that Juries should be *directed* to
find a Man *Guilty of a Crime*, for publishing
a Paper which perhaps contains no *criminal*
Matter whatsoever; and that the Question of
the *Criminality or Innocence* of the Person
thus *blindly convicted* by the Jury, should
afterwards be decided by *Judges* appointed
by the Crown: which System, if it had
been established, would have annihilated at
one Blow the Liberty of England.

It is said, “ That the Criminality or In-
“ nocence of *any Act done* (which includes
“ any Paper written) is the Result of the
“ Judgment

“ Judgment which the Law pronounces upon
 “ on that Act, and must therefore be, in
 “ all Cases, and under all Circumstances,
 “ *Matter of Law*, and not *Matter of*
 “ *Fact* †.”

By “ *any Act done*,” it is obviously meant
 the criminal Killing in the Case of Murder,
 the Burglary in the Case of Housebreaking,
 the criminal Publication in the Case of Li-
 bel, &c. And the *Criminality* of each of
 these Acts is said to be *Matter of Law*.

Now, let us consider what is the Practice
 of the Judges upon this Subject. In the
 Case of Homicide, they always leave to the
 Jury to find, that the Prisoner is Guilty of
 Murder, or Guilty of Manslaughter, or Not
 Guilty; but they do *not* direct the Jury to
 find the *Fact* of killing, and the *Circumstances*
 that attended the killing, and to leave to the

† See the Answer of the Judges to the first
 Question put to them by the House of Lords.

Court to decide upon the Point of *Law*; namely, whether such killing be Murder, or Manslaughter, or justifiable Homicide. In like manner, in the Case of Housebreaking, they leave to the Jury to find whether the Prisoner be Guilty or Not Guilty of *Burglary*; but they do *not* direct the Jury to find the *Facts*, and to leave to the Court the Decision of the *Matter of Law*. On the contrary, in both these Cases, it is every Day's Practice, for the Judge or Court before whom the Defendant is tried, to leave to the *Jury*, not only the Decision upon the Matters of Fact, but also the Decision upon the *Criminality* or *Innocence* of the Defendant.

It therefore becomes necessary to examine, whether there be any good Reason for adopting a *different* Line of Conduct in the Case of *Libel*, from that which it is the daily Practice of the Judges to pursue in the Case of *Murder*. But first, it will be proper to take a general View of the Nature of the Proceedings upon a criminal Prosecution.

The

The very *Form of the Proceedings* upon the Trial of a Person charged with *any Crime*, proves that it is *not* the *Judge* who is to decide, but the *Jury*, whether such Person be, or be not, *Guilty*. The Form of those Proceedings may be found in different Books.

If the Defendant say, *Not Guilty*, he is then asked, *How wilt thou be tried?* which was formerly a very significant Question, though it is not so now; because anciently, trial by *Battel*, and trial by *Ordeal* were used, as well as by the Country, or a Jury. Therefore, it is now usually answered, “ *By God and the Country.*” The Jury are then called; the Proclamation is then made; the Defendant is then told he may challenge the Jury; and the Jury is then sworn. Then they are counted (to know whether the Jury be complete); and then they are *charged* in the following words: “ You good Men that are
“ sworn, you shall understand, that A. B.

“ now

" now Prisoner at the Bar, stands indicted,
 " for that he" [reciting the Indictment]:
 " to which Indictment he hath pleaded *Not*
 " *Guilty*, and for his Trial hath put him-
 " self upon *God and his Country*, which
 " **COUNTRY YOU ARE**; so that *Your*
 " *Charge* is, to inquire whether he be *Guil-*
 " *ty* of the" [Crime] "*whereof he stands*
 " *indicted*, or *not Guilty*."

Of what Crime, therefore, is the Jury
charged to inquire, whether the Prisoner be
 Guilty, or Not Guilty? Of the Crime, says
 the CHARGE, *whereof he stands indicted*.
 And where are the Jury to find *that Crime*
 described? Of course in the INDICT-
 MENT. Let us then (in order to find the
 accurate *Description* of that Crime) examine
 the Form of the Indictment, which is as fol-
 lows: *videlicet*, " That A. B. late of —, in
 " the County of —, on the — day of
 " —" [feloniously, or maliciously, or
 otherwise, as the Case may be] " did" [stat-
 ing

ing the Crime committed]. “ And so the
 “ Jurors aforesaid,” [namely, the Grand Ju-
 ry], “ upon their Oath do say, that the said
 “ A. B. on the aforesaid Day, at —, in
 “ the County of —, in Manner and Form
 “ aforesaid,” [feloniously, or maliciously,
 or otherwise, as the Case may be] “ did”
 [stating the Crime committed] “ against the
 “ Peace of our said Lord the King, his
 “ Crown and Dignity, and against the Form
 “ of the Statute in such Case made and pro-
 “ vided.”

It is therefore the *Right*, and the *Duty* of
 a Jury to find the Defendant *Not Guilty*, un-
 less they be *convinced* ; first, that he *commit-*
ted the Act ; secondly, that he did it with
legal Malice ; thirdly, that the Act so done
 was “ *against the Peace of the King*,” that is
 to say, against the Peace of the Country ; and
 fourthly (when it is an Offence against an
 Act of Parliament), that the Act so done was
 “ *against the Form of the Statute in such Case*

"*made and provided.*" But the Law implies that "*Every Offence against the Statute is against the Peace,*" as Lord Hale † says.

In the Case of an Offence against an Act of Parliament, the Jury being expressly *charged* to find, whether the Act done be, or be not, done "*against the Form of the Statute,*" it is manifestly an Absurdity to maintain, that in *that* Case the Jury have *no Right* to decide upon Matter of *Law*; for, nothing can be more clearly *Matter of Law*, than the *Construction of an Act of Parliament*. The Absurdity of the Proposition, that Juries have no Right to decide upon Matters of Law, as well as upon Matters of Fact, when a *complex Question* of Law and Fact is brought before them, is equally gross in every other Instance; though, in some Instances, it may possibly be less striking.

† See Lord Hale's Pleas of the Crown, Vol. ii. p. 188.

Suppose a Man to be indicted for High
 Treason, upon the Statute of Queen Anne †,
 by which it is enacted, “ That if any Per-
 son or Persons shall, maliciously, advised-
 ly and directly, by *writing or printing*,
 maintain and affirm, that the Kings or
 Queens of this Realm, with and by the
 Authority of Parliament, are not able to
 make Laws and Statutes of sufficient
 Force and Validity to limit and bind the
 Crown, and the Descent, Limitation,
 Inheritance, and Government thereof,
 every such Person or Persons shall be
 guilty of High Treason, and being there-
 of lawfully convicted, shall be adjudged
 Traitors, and shall suffer Pains of Death,
 and all Losses, and Forfeitures, as in Cases
 of High Treason.” And suppose that the
whole of the Book, or of the Paper published,
 be put in the *Indictment*.

† VI Anne, Chap. vii. §. 1.

Now, let us examine, whether it will best answer the Ends of Justice, that the Criminality, or Innocence of the Person so accused of High Treason, be decided by a Jury, or by the Court.

A Prisoner has the Advantage of challenging *peremptorily*, Twenty Jurymen in the Cases of Petit Treason and Felony, and no less than *Thirty-five* in the Case of High Treason; and he has also the Advantage of challenging *for Cause*, any Number of Jurymen, without limit, in *all* Cases †. This shews

† Blackstone, in his Commentaries, Vol. iv. p. 353, 8th Edit. after having explained the different Grounds for challenging Jurymen, says " Challenges upon any of the foregoing Accounts " are stiled *Challenges for Cause*, which may be " *without Stint* in both *criminal* and civil Trials. " But in criminal Cases, or at least in capital " ones, there is (*in favorem vite*) allowed to the " Prisoner an arbitrary and capricious Species of " Challenge

shews how great an Advantage it is to any Person in this Country, to be tried by a Jury of his Equals, from which he has excluded all

~~any other persons who might be prejudiced by the~~

" Challenge to a certain number of Jurors,
 " without shewing any Cause at all, which is
 " called a *peremptory Challenge*; a Provision full of
 " that Tenderness and Humanity to Prisoners, for
 " which our English Laws are justly famous.
 " This is grounded on two Reasons. 1st. As
 " every one must be sensible, what sudden Im-
 " pressions and unaccountable Prejudices we are
 " apt to conceive, upon the bare Looks and Ges-
 " tures of another; and how *necessary* it is, that a
 " Prisoner (when put to defend his Life) should
 " have a good Opinion of *his Jury*, the want of
 " which might totally disconcert him; ~~the Law~~
 " wills that he should *not* be tried by *any one*
 " Man against whom he has conceived a Preju-
 " dice, even without being able to *assign* a Reason
 " for such his Dislike. 2^{dly}, Because upon *Chal-*
 " *lenges for Cause* shewn, if the Reason assigned
 " prove insufficient to set aside the Juror; per-
 " haps the bare questioning his Indifference may
 " sometimes

exceptionable Men. Whereas, were *the Judges*, or any of them, to decide upon his Innocence or Guilt, he would be tried by Men, *not one of whom* he could challenge, however *obnoxious* they might be to him; for, *Blackstone*, in his Commentaries †, says;
 “ By the Laws of England, in the Times of
 “ *Bracton* and *Pleta*, a Judge might be re-
 “ fused for good Cause; but, now the Law is
 “ otherwise, and it is held that *Judges* or
 “ *Justices* cannot be challenged.”

Suppose, for example, that *Sir Elijah Impey*, who was a Judge in India, were to be made a Judge in England; and suppose that the Honourable Member of the House of Commons, who moved, in that House, that

“ sometimes provoke a Resentment; to prevent
 “ all ill Consequences from which, the Prisoner
 “ is still at liberty, if he pleases, *peremptorily* to
 “ set him aside.”

† Vol. iii. p. 361. 8th Edit.

Sir

Sir Eliab Impey be impeached for the Murder of *Nuncomar*, were to be indicted for publishing a Pamphlet supposed to contain *High Treason*; no Man could endure the Idea that that Gentleman's Condemnation or Acquittal should depend upon the *Decifion* of that very Man, whom he had (properly † or improperly, no Matter which) thus publicly accused.

But, to put a still stronger Case. Suppose a Member of the House of Commons were to move that House to impeach *all the Judges* of the Court of King's Bench (and one of the *principal Reasons* for which the Trial by Impeachment was established, was in order to be able to punish Judges who might de-

† No reflection whatever is here intended against the Learned Gentleman above alluded to; inasmuch, as it is to be presumed that he was innocent, as the House of Commons rejected the Motion for his Impeachment.

serve

serve it); and suppose that that Motion were to be adopted by that House, and that those Judges were to be actually tried in Westminster Hall, at the Bar of the House of Lords; and suppose that, from the Death of some material Witness, or other Cause, those Judges, so impeached, were to be acquitted. Could it be endured, that the Fate of the Managers who had conducted the Impeachment, nay perhaps, that the Fate of the very Gentleman who had moved it in the House of Commons, should, upon an Indictment for a Libel, or perhaps upon an Indictment for High Treason, *depend* upon those very Judges whom they had thus impeached, instead of depending upon the Decision of a fair, honest and impartial Jury?

Blackstone, in his Commentaries†, speaking of the Trial by Jury or the Country,

† Vol. iv. p. 349. 18th Edit.

says,

says, " The Antiquity and Excellence of this
 " Trial for the settling of civil Property has
 " before been explained at large. And it
 " will hold much stronger in *criminal Cases*;
 " since, in Times of Difficulty and Danger,
 " more is to be apprehended from the
 " VIOLENCE AND PARTIALITY OF
 " JUDGES appointed by the Crown, in
 " Suits between the King and the Subject,
 " than in Disputes between one Individual
 " and another, to settle the *Metes and Boun-*
 " *daries of private Property*. Our Law has
 " therefore wisely placed this strong and
 " *two-fold* Barrier, of a *Presentment*, and
 " a *Trial by Jury*, between the Liberties of
 " the People, and the Prerogative of the
 " Crown. It was necessary for preserving
 " the admirable Balance of our Constitution,
 " to vest the Executive Power of the Laws
 " in the Prince: and yet this Power might
 " be dangerous and destructive to that very
 " Constitution, if exerted without Check or

“ Controul, by *Justices of Oyer and Ter-*
 “ *miner* occasionally named by the Crown;
 “ who might then, as in *France or Turkey*,
 “ imprison, dispatch, or exile, any Man that
 “ was obnoxious to the Government, by an
 “ instant Declaration, that such is *their* Will
 “ and Pleasure. But the Founders of the
 “ English Laws have, with excellent Fore-
 “ cast, contrived that no Man should be
 “ called to answer to the King for any capi-
 “ tal Crime, unless upon the preparatory Ac-
 “ cusation of Twelve or more of his Fellow-
 “ Subjects, the Grand Jury; and that the
 “ *Truth of every Accusation*, whether pre-
 “ ferred in the Shape of Indictment, In-
 “ formation, or Appeal, should afterwards
 “ be confirmed by the *unanimous Suffrage*
 “ *of Twelve of his Equals and Neighbours*,
 “ indifferently chosen, and superior to all
 “ Suspicion. So that the Liberties of Eng-
 “ land cannot but subsist, so long as this
 “ *Palladium* remains sacred and inviolate; not
 “ only

“ only from all *open* Attacks (which none
 “ will be so hardy as to make); but, also
 “ from all *secret Machinations*, which may
 “ sap and undermine it.”

And again † “ An open Verdict may be
 “ either *General*, Guilty, or Not Guilty; or
 “ else *Special*, setting forth all the Circum-
 “ stances of the Case, and praying the
 “ Judgment of the Court, whether, for In-
 “ stance, on the *Facts stated*, it be Murder,
 “ Manlaughter, or no Crime at all. This
 “ is where they doubt the Matter of Law,
 “ and therefore *chuse* to leave it to the De-
 “ termination of the Court; though they
 “ have an *unquestionable Right* of determining
 “ upon all the Circumstances, and finding a
 “ *General Verdict*, if they think proper.”

The Right which a Jury has (and which
 is not questioned) of finding a *Special Verdict*

† Vol. iv. p. 361. 8th Edit.

when they *chuse* to leave the Determination on Matter of *Law* to the Court, is a plain Proof that the Jury are Judges of Law, as well as of Fact. For, their *leaving the Decision on the Law* to the Court, evidently implies, that if they please, they have that *Right of Decision* in themselves.

The famous *Bracton*, who wrote above five hundred Years ago, speaking of Cases of Life, Limb, Crime, and Disinheritance of the Heir *in capite*, says, “ *The King* could not decide; for, then he would have been both *Prosecutor and Judge*; neither could his *Justices*, for they *represent* him.” If, therefore, for the Reasons given by *Bracton*; neither the King nor his Justices can decide; of course, the Jury must.

In a Book of the first Authority, compiled by the famous *Littleton* †, in the Reign of King Edward the Fourth, in which Reign

† Section 368.

he was a Judge, it is said, "In such Case,
 "where the Inquest," (that is to say, the Jury)
 "may give their Verdict at large, if they
 "will take upon them the Knowledge of the
 "Law upon the Matter, they may give their
 "Verdict generally, as is put in their Charge."
 And the Law as thus laid down by *Littleton*,
 is confirmed by *Lord Coke*, in his *Institutes* †.

If, therefore, in the Days of *Littleton*,
 when Knowledge was so much more con-
 fined than it is at present, Juries were deem-
 ed competent to "take upon them the
 "Knowledge of the Law," it is a gross In-
 sult to the Understanding of Mankind, in
 this enlightened Age, to maintain that Juries
 are now incompetent to do so, and that it is
 to their Province only to try Facts.

A Case is reported in *Salkeld* ††, where

† First Institutes, p. 228.

†† Vol. iii. p. 373.

Lord Chief Justice *Holt* held, that “ In all
 “ Cases, and in all Actions, the Jury may
 “ give a *General* or Special Verdict, as well
 “ in Causes *criminal* as civil; and the
 “ Court ought to receive it, if pertinent to the
 “ Point in Issue; for, if the Jury doubt, they
 “ may refer themselves to the Court, but are
 “ not bound so to do.”

This same learned Chief Justice, in his
 Direction to the Jury, upon the Trial † of
John Tutchin for a Libel, said; “ They”
 (meaning Tutchin’s Counsel) “ say, they
 “ are innocent Papers, and no Libels; and
 “ they say, *nothing is a Libel* but what re-
 “ flects upon *some particular Person*.” And
 again, “ Now, you are to consider, whether
 “ these Words I have read to you, do not be-
 “ get an ill Opinion of the Administration of
 “ the Government.”

† State Trials, Vol. v. p. 542. 3d Edit.

Here then, Lord Chief Justice *Holt* tells the Jury, in the the plainest Terms, that it is *they* who are "to consider" what *Effect and Operation* the Papers in Question *do* produce. He does *not* say to the Jury, I am not called upon *to discuss the Nature of this Libel*; go and decide whether the Defendant *did publish it*; go and determine the *Sense of the Passages* in the Paper; those are the *two Points for you to attend to*. That able Chief Justice of the King's Bench did *not* act in a Manner so *illegal*.

In the famous Case of the *Seven Bishops*, who were tried in the Reign of King James the Second, for publishing a Libel, for having presented a Petition to the King; the four Judges of the Court of King's Bench widely differed in Opinion as to the Criminality of the Bishops, and *every one of them* delivered his Opinion thereon to the Jury†.

† State Trials, Vol iv. p. 394, and following,
3d Edit.

and expressly left to them the Decision of the *Matter of Law*, under *all* the Circumstances of the Case. Lord Chief Justice *Wright*, at the End of his Direction to the Jury, said, " I must, in short, give you my Opinion; *I do take it to be a Libel*. Now, this, being a *Point of Law*, if my Brothers have any thing to say to it, I suppose they will deliver their Opinions."

Mr. Justice *Holloway* then addressed the Jury as follows. " Look you, Gentlemen, it is not usual for any Person to say any Thing after the Chief Justice has summed up the Evidence; it is not according to the Course of the Court. But this is a Case of an extraordinary Nature, and there being a *Point of Law* in it, it is very fit every Body should deliver their own Opinion. The Question is, whether this Publication of my Lords the Bishops be a *Libel*, or no. Gentlemen, the *End and Intention* of every Action is to be considered; and likewise

" wise in this Case, we are to consider the
 " *Nature of the Offence* that these Persons are
 " charged with. It was for delivering a
 " Petition, which, according as they have
 " made their Defence, was with all Humi-
 " lity and Decency that could be; so that,
 " if there was *no ill Intent*, to deliver a Peti-
 " tion cannot be a Fault; it being the Right
 " of a Subject to petition. *If you are sa-*
 " *tisfied there was an ill Intention of Sedition,*
 " *or the like, you ought to find them guilty:*
 " but, if there be nothing in the Case that
 " you find, but only that they did deliver a
 " Petition to save themselves harmless, and
 " to free themselves from Blame, by shew-
 " ing the Reason of their Disobedience to the
 " King's Command, which they apprehend-
 " ed to be a Grievance to them, and which
 " they could not in Conscience give Obedi-
 " ence to; *I cannot think it is a Libel.* It is
 " left to you, Gentlemen; but that is my
 " Opinion."

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Mr.

Mr. Justice *Powell* then delivered his Opinion. " Truly," (says he) " I cannot see, " for my Part, *any thing of Sedition*, or any " *other Crime*, fixed upon these Reverend Fathers my Lords the Bishops.

" For, Gentlemen, to make it a *Libel*, it " must be *false* †, it must be *malicious*, and " it must *tend to Sedition*. As to the *Falseness*, I see nothing that is offered by the " King's Counsel, nor any Thing as to the " *Malice*. It was presented with all the " Humility and Decency that became the " King's Subjects to approach their Prince " with. Now Gentlemen, the Matter is " before you; you are to consider of it, and " it is worth your Consideration."

Mr. Justice *Allybone* said, " The single " Question that falls to my Share is, to give

† The Seven Bishops had been charged with publishing " a *false*, feigned, *malicious*, pernicious, and *seditious Libel*."

“ my Sense of this Petition ; whether it shall
 “ be in *Construction of Law*, a Libel in itself,
 “ or a Thing of great Innocence.”

He then spoke to the Point, and gave his
 Opinion, that it was “ a Libel.”

It is well known what violent Attacks
 were made upon the Constitution, by the
 Judges, in the Reign of that Tyrant King
 James the Second: I quote this famous
 Case therefore, only to shew, that *even those*
Judges did not venture to go the Length
 of *denying to Juries* the Right of deciding
 upon the *Guilt or Innocence* of Persons ac-
 cused. And it was pointedly said by Earl
 Camden, “ What would the Judges of King
 “ James the Second have given for this
 “ Doctrine? It would have served as an ad-
 “ mirable Footstool for Tyranny.”

The Right of Juries to give a General
 Verdict upon the whole Matter in Issue is
 evident from this Circumstance; that such
 Verdict, so given, cannot be set aside by the

Court, under Pretence that it is *contrary to Evidence*, or *contrary to the Directions* of the Court or Judge, if it be a *Verdict of Acquittal*.

This Principle is recognized by various Decisions; and amongst others, in the Cases of the *King against Davis and others*, and of the *King against Bear*. The first of these Cases is reported in Shower†; it was “an
 “Information for an Assault and Riot, tried
 “at the Devonshire Assizes, and a Verdict
 “was found for the Defendants that they
 “were *Not Guilty*. Serjeant Tremayne moved
 “for a *New Trial*, upon Affidavits of the
 “Fact, and that the *Judge's Directions* were
 “to find the Assault: the Motion for a New
 “Trial was opposed, because it was in a
 “Criminal Proceeding, and no Corruption
 “or *Practice* shewed; and a *New Trial* was
 “denied; for, that the Court said, there could

† Vol. I. p. 336.

“be *no Precedent* shewn for it in *Case of Acquittal.*”

The *Case of the King against Bear* is reported in Salkeld†; it was “an *Indictment* for a *Libel*, and the *Defendant* was, “by a *Verdict*, acquitted. *Mr. Attorney General* moved for a *New Trial*, but it “was *denied*: and the *Court* said, that *an-* “ciently it was *never* done in *Criminal Cases*, “where *Defendants* have been *acquitted*; “latterly, where it has been a *Verdict* obtain- “ed by *Fraud* or *Practice*, as *stealing away* “*Witnesses*, &c. it has been done; but *never* “yet *was done* merely upon the *Reason* that “the *Verdict* was *against Evidence.*”

These *Cases* clearly shew, that the *Authority* of the *Jury* is *superior* to that of the *Court*, in the *Case of Acquittal.*

In the *State Trials* †† there is a curious

† Vol. II. p. 646. 3d Edit.

†† *State Trials*, Vol. II. p. 76. 3d Edit.

Account of the Trial of the famous Lieutenant-colonel John Lilburne for High Treason, in the Reign of King Charles the Second. He addressed the Judges thus: " You Judges
 " that sit there are no more, if the Jury
 " please, but *Cyphers* to pronounce the Sentence, or their Clerks to say *Amen* to them;
 " being, at best, in your Origin, but the
 " *Norman Conqueror's Intruders.*" (Lilburne meaning, no Doubt, thereby, that the Judges were Intruders when they intruded on the legal *Province of the Jury.*) He also addressed the Jury thus: " My honest Jury,
 " and Fellow Citizens, who I declare, by
 " the Law of England, are the *Conservators*
 " and *sole Judges* of my Life, having inherited in them *alone* the judicial Power of
 " the *Law* as well as *Fact.*"

The Jury acquitted *Lilburne*; and they were afterwards arbitrarily examined before the Council of State, concerning their Verdict.

dict †. In general their Reply was, “ *That*
 “ *they had discharged their Consciences*” in
 their Verdict; and most of them would give
no other Answer; and a more sensible Answer
 they certainly could not give. But James
 Stephens, one of the Jurymen, went further,
 and said, that “ *The Jury having weighed all*
 “ *which was said, and conceiving themselves*
 “ (notwithstanding what was said by the
 “ *Counsel and Bench to the contrary*) *to be*
 “ *Judges of Law, as well as of Fact, they*
 “ *had found him Not Guilty.*” Michael Ray-
 ner, another Jurymen, answered nearly to
 the same Effect. And Gilbert Gayne, ano-
 ther of the Jury, said, “ *That the Jury did*
 “ *find as they did, because they took them-*
 “ *selves to be Judges of the Law as well as*
 “ *of the Fact; and that although the Court*
 “ *did declare, they were mere Judges of the*
 “ *Fact only, yet the Jury were otherwise per-*

† State Trials, Vol. II. p. 81, 82. 3d. Edit.

suaded

“suaded from what they learnt out of the
“Law-Books.”

This was the manly Conduct of an honest and high-spirited *Jury*, who discharged their Duty, by acquitting a Man whom they deemed to be innocent.

Another Proof of the Rights of Juries is, that a Jury *cannot be punished* by the Court for their Verdict. It has been well said, that that Question should be looked upon as dead and buried since the famous Case of *Bushell*, which is reported by Lord Chief Justice *Vaughan*. *Bushell* was one of the Jury in the Case of the *King against Penn and Meade*, and had been committed for finding the Defendants *Not Guilty*, against Law, against Evidence, and *against the Direction of the Court in Matter of Law*; and being brought before the Court of Common Pleas by *Habeas Corpus*, this Cause of Commitment appeared upon the Face of the Return to the Writ.

It was upon that Occasion, that that distinguished Chief Justice, reciting the following
Words

words in the return, viz. “ *That the Jury acquitted those indicted against the Direction of the Court in Matter of Law, openly given and declared to them in Court,*” expressed himself thus †: “ The Words, *That the Jury did acquit, against the Direction of the Court, in Matter of Law,* literally taken, and *de plano,* are insignificant, and not intelligible ; for, no Issue can be joined of Matter in Law, no Jury can be charged with the Trial of Matter in Law barely, no Evidence ever was, or can be given to a Jury of what is Law, or not ; nor no such Oath can be given to, or taken by, a Jury, to try Matter in Law ; nor no Attaint can lie for such a false Oath.

“ Therefore we must take off this *Vail and Colour of Words,* which make a Shew of being *something,* and in Truth are *nothing.*

“ If the Meaning of these Words, *finding*

† Vaughan’s Reports, p. 143.

“ *against the Direction of the Court in Mat-*
 “ *ter of Law*, be, that if the *Judge* having
 “ heard the Evidence given in Court (for,
 “ *he* knows no other), shall tell the *Jury*,
 “ upon this Evidence, the *Law* is for the
 “ Plaintiff, or for the Defendant, and you
 “ are under the Pain of *Fine and Imprison-*
 “ *ment* to find accordingly, then the *Jury*
 “ ought of *Duty* so to do ; *every Man* sees
 “ that the *Jury* is but a troublesome Delay,
 “ great Charge, and of no Use in determining
 “ Right and Wrong, and therefore the Trials
 “ by them may be better abolished than con-
 “ tinued ; which were a *strange new-found*
 “ *Conclusion*, after a Trial so celebrated for
 “ many hundreds of Years.”

“ But if the *Jury*” (says this learned
 and able Chief Justice †) “ be not obliged,
 “ in *all* Trials, to follow such Directions, if
 “ given ; but, only in *some* sort of Trials (as

† Vaughan's Reports, p. 144.

“ for instance, in Trials for *Criminal Matters*
 “ upon Indictments or Appeals); why then
 “ the Consequence will be, though not in *all*;
 “ yet in *Criminal Trials*, the Jury (as of no
 “ material Use) ought to be either omitted
 “ or abolished, which were the *greater Mis-*
 “ *chief to the People*, than to abolish them in
 “ *Civil Trials*.”

And again †, “ Always, in discreet and
 “ lawful assistance of the Jury, the Judge’s
 “ Direction is *hypothetical*, and upon Sup-
 “ position, and *not positive and upon Coercion*.”

This able Judge, in the same Case, gives
 us the Reasons *why* a Jury ought *not* to be
fined and imprisoned, for finding against the
Direction of the Court in Matter of Law; and
 his Arguments are unanswerable.

“ I would know” (says he ††) “ whether
 “ any thing be *more common*, than for two

† Page 144.

†† Pages 141 and 142.

“ Men, Students, Barristers, or Judges, to
 “ deduce contrary and *opposite Conclusions* out
 “ of the same *Case in Law*? And is there
 “ any Difference that *two* Men should infer
 “ distinct Conclusions from the same Tes-
 “ timony? Is any thing more known than
 “ that the same Author, and Place in that
 “ Author, is forcibly urged to maintain con-
 “ trary Conclusions, and the Decision hard,
 “ which is in the Right? Is any thing more
 “ frequent in the Controversies of Religion,
 “ than to press the same Text for opposite
 “ Tenets? How then comes it to pass that
 “ two Persons may not apprehend, with Rea-
 “ son and Honesty, what a Witness, or many,
 “ say, to prove in the understanding of one,
 “ plainly one Thing; but in the Apprehension
 “ of the other, clearly the contrary Thing?
 “ Must, therefore, *one* of these *merit Fine*
 “ *and Imprisonment*, because he doth that
 “ which he cannot *otherwise* do, preserving

“ his

“ his *Oath and Integrity* ? And this often is
 “ the Case of the *Judge and Jury*.”

What this learned Chief Justice says in the
 same Case, respecting the *Direction of the*
Judge, is excellent. “ No Case” (says † he)
 “ can be invented ; wherein it can be main-
 “ tained, that a *Jury* can find, in *Matter of*
 “ *Law, nakedly, against the Direction of the*
 “ *Judge*.”

“ Sure this latter Age” (says he ††) “ did
 “ not first discover, that the Verdicts of
 “ Juries were many Times not according to
 “ the Judges Opinion and Liking.

“ But the Reasons are, I conceive, most
 “ clear, That the Judge could not, nor can
 “ *fine and imprison* the Jury in such Cases.

“ Without a *Fact* agreed, it is as *impossible*
 “ for a Judge, or any other, to know the *Law*
 “ relating to *that Fact*, or direct concerning
 “ it, as to know an Accident that hath no
 “ Subject.

† Page 145.

†† Pages 146 and 147.

“ Hence,

" Hence it follows, That the Judge can
 " never direct *what the Law is* in any Matter
 " controverted, without *first* knowing the
 " Fact; and then it follows, That without
 " his *previous* knowledge of the Fact, the
 " Jury cannot go against his Direction in
 " Law; for, he *could not direct*.

" But the Judge, *quâ* Judge, cannot know
 " the Fact possibly, *but from the Evidence*
 " *which the Jury have*; but (as will appear)
 " he can never know *what Evidence* the
 " Jury have, and consequently he cannot
 " know the Matter of Fact, nor punish the
 " Jury for going against *Their Evidence*,
 " when he *cannot know what Their Evidence*
 " is.

" It is true, if the Jury were to have *no*
 " *other Evidence* for the Fact, but what is
 " deposed in Court, the Judge might know
 " *Their Evidence*, and the Fact from it,
 " equally as they, and so direct what the
 " Law were in the Case; though even then

" the

“ the Judge and Jury might *honestly differ* in
 “ the Result from the Evidence, as well
 “ as two Judges may, which often hap-
 “ pens.”

“ But the Evidence which the Jury have
 “ of the Fact, is much other than that ; for,
 “ they may have Evidence from their *own*
 “ *personal Knowledge* †, by which they

† Even when a Fact is *admitted* by a Defendant, it is *Evidence* of the Fact, but not *conclusive* Evidence ; as for instance, suppose a Defendant, charged with having *published* a Libel, were, by mistake, to *admit* that he had *sold one Copy* of it to *one of the Jurymen* ; it might so happen that the Book so sold might be *another Book* with the *same Title*, or *another Number or Volume* of the *same Work*. The Juryman would therefore *know*, that the *Fact admitted* was *not true*. Therefore, in the Eye of the Law, NO FACT (even though admitted) can be considered as *proved*, until the *Jury have found it* ; either by a *Special Verdict* that states it, or by a *General Verdict* that implies it.

“ may

“ may be assured, and sometimes are, that
 “ what is depofed in Court, is absolutely
 “ *false*; but to this the *Judge* is a Stranger,
 “ and *he* knows no more of the Fact than
 “ he hath learned in Court, and perhaps by
 “ *false* Depositions, and consequently *knows*
 “ *Nothing*.

“ The *Jury* may know the Witneſſes to
 “ be ſtigmatized and infamous, which may
 “ be *unknown* to the Parties, and confe-
 “ quently to the *Court*.”

“ A Man” (ſays he †) “ cannot ſee by
 “ another’s Eye, nor hear by another’s Ear;
 “ no more can a Man *conclude or infer* the
 “ Thing to be reſolved, by *another’s Under-*
 “ *ſtanding or Reasoning*. And though the
 “ Verdict be right the *Jury* give; yet they,
 “ being not aſſured it is ſo from their *own*
 “ *Underſtanding*, are forſworn, at leaſt *in foro*
 “ *conſcientiæ*.”

This celebrated Chief Justice further says †,
 “ That *Decantatum*” (or saying) “ in our
 “ Books, *Ad quæstionem facti non respondent*
 “ *Judices, ad quæstionem legis non respondent*
 “ *Juratores*, literally taken, is true : for, if
 “ it be demanded, What is the *Fact*? the
 “ Judge cannot answer it. If it be asked,
 “ What is the *Law* in the Case? the Jury
 “ cannot answer it. Therefore, the Parties
 “ agree the *Fact* by their pleading upon *De-*
 “ *murrer*, and ask the Judgment of the *Court*
 “ for the *Law*. In *Special Verdicts*, the
 “ *Jury* inform the *naked Fact*, and the *Court*
 “ deliver the *Law*.

“ But” (says he ††) “ upon all *General*
 “ *Issues*, the Jury find *not* (as in a *Special*
 “ *Verdict*) the *Fact* of every Case by itself,
 “ leaving the *Law* to the *Court*; but find
 “ for the Plaintiff or Defendant upon the

† Vaughan's Reports, p. 149.

†† Page 150.

“ *Issue* to be tried, wherein they resolve both
 “ *Law and Fact* complicately, and not the
 “ *Fact* by itself; so as though they answer
 “ not singly to the Question what is the
 “ *Law*, yet they determine the *Law* in all
 “ *Matters*, where *Issue* is joined, and tried
 “ in the principal Case; but where the Ver-
 “ dict is *Special*.”

The whole Court of *Common Pleas* con-
 curred with Lord Chief Justice *Vaughan*,
 in this Opinion; and *Busbell* was dis-
 charged.

I have now fully proved, that a Jury is
 not punishable by the Court for their Verdict,
 however much the Court may be dissatisfied
 therewith: And although there be a Process,
 called a Writ of *Attaint*, by which a Jury
 may be tried for their Verdict in civil Cases,
 by a Grand Jury of Twenty-four; yet, a
 Jury is not liable to an *Attaint* at the Suit of
 the King.

In the Case of the Dean of St. Asaph, his
 Counsel

Counfel Mr. *Erskine*, in Michaelmas Term 1784, moved the Court of King's Bench for a *new Trial*; and on that Occasion (referring to what was said respecting an *Attaint*, by Lord Chief Justice Vaughan in *Bushell's Case*) said †, “ There is *no Case* in all the “ *Law of an Attaint for the King*, nor any “ Opinion but that of *Thyrning's*, 10th of “ Henry the Fourth, title *Attaint*, 60 and “ 64, for which there is *no Warrant in “ Law.*”

Lord Mansfield concurred in this Opinion, and said ††, “ *To be sure it is so.*”

So, here we have the Chief Justice of the King's Bench, expressly confirming the Law respecting *Attaint*, as laid down by Vaughan, that illustrious Chief Justice of the Common Pleas.

† See Mr. *Erskine's* Argument in Support of the Rights of Juries, p. 138.

†† Page 138.

Lord Camden has maintained, that " the Judge is to give his *Advice* to the Jury " *both as to Law and Fact.*" To which it has been answered, that Lord Hale lays it down, that the Judge is to give his *Advice* to the Jury only as to the *Fact*, but that the Jury must receive the *Direction* of the Judge in *Matter of Law.* Whereas, Lord Hale, on the contrary, has used the Word *Direction*, indifferently as applied, either to Matter of *Fact* †, or to Matter of *Law* ††.

But even the very Passage in Lord Hale, where he says that a Judge " is able to direct " a Jury in *Matters of Law*, makes against the Opinion of those who deny to a

† In Lord Hale's History of the Common Law, p. 260. (3d Edit.), he speaks of the " Advantage of the Judge's Observation, Attention " and Assistance, in Point of *Fact*, by way of " *Direction* to the Jury."

†† See p. 257 of the same Book.

Jury the Rights which I am contending for; for, Lord Hale, in his History of the Common Law, Page 257, says, " Another Excellency of this Trial" (namely, the Trial by Jury) " is this; that the Judge is *always present* at the Time of the Evidence given in it: herein he is able, in *Matters of Law* emerging upon the Evidence, to direct them; and also, in *Matters of Fact*, to give them a great Light and Assistance by his weighing the Evidence before them, and observing where the Question and Knot of the Business lies, and by shewing them HIS OPINION, even in *Matter of Fact*, which is a great Advantage and Light to Laymen: and thus, as the Jury assists† the Judge

† " As the Jury assists the Judge in determining the *Matter of Fact*." These Words of Lord Hale may not be immediately understood, inasmuch as the Judge never does determine "*Matter of Fact*"

"Judge in determining the *Matter of Fact* ;
 "so the Judge *ASSISTS* the Jury *IN* deter-
 "mining Points of *Law*."

Lord Hale does *not* say here, that the Judge is to *direct*, but that he is *able to direct* the Jury. Neither does he say, that the Judge *ASSISTS* the Jury, *BY* determining, but *IN* determining Points of *Law* : that is to say, that the Judge is to *ASSIST* the Jury ; but that after all, the Jury them-

"*Fact*." But, as the Judge may give his Opinion, even as to *Matter of Fact*, the Jury may greatly *assist* the Judge in forming his Opinion respecting the Fact, by putting occasional Questions to the Witnesses, *previously* to his summing up the Evidence. A Juryman, for Instance, who is a Merchant, a Chymist, or a Mechanician, may ask Questions, in certain Cases, pertinent to the Matter in Issue, which Questions might not occur either to the Judge or to the Counsel.

selves

themselves are the Persons who are to DETERMINE the *Law* as well as the *Fact*. The Judge therefore acts only as an *Assessor* to the Jury. And a further Proof of this is, that Lord Hale says, "Another Excellency of this Trial is this, that the Judge is *always* present at the Time of the Evidence given in it."

Now, this Expression of Lord Hale would be an Absurdity, if the Judge really were what the Enemies of Mr. Fox's Libel Bill would have us suppose him to be; namely, a Person who is to decide upon Matters of *Law* emerging out of the Evidence, so as therein to control the Judgment of the Jury: for then, the Presence of the Judge would be a Thing, at all Events, absolutely *necessary and indispensable*; and would not be, as Lord Hale well states it, merely a Thing *advantageous*, and (to use his own Words) an *Excellency* of this Mode of Trial. And in fact, if the Constitution had intended that the Judge should rule the

Verdict

Verdict in Matters of *Law*, the Judge would not be (as he now is) *prohibited* from being even *present* with the Jury, when they go together to agree upon their *Verdict*. So that, in every Point of View, it is quite clear, that the Judge is an *Assessor* to the Jury, and that he is nothing more.

The learned Commentator † on the Laws of England understands Lord Hale in the same Sense as I understand him, when he says; “ The Practice heretofore in Use, “ of fining, imprisoning, or otherwise punishing Jurors, merely at the Discretion “ of the Court, for finding their *Verdict* “ contrary to the Direction of the Judge, was “ arbitrary, unconstitutional, and illegal; and “ is treated as such by Sir Thomas Smith, “ two hundred Years ago; who accounted “ such Doings to be very violent, tyrannical,

† Blackstone's Commentaries, Vol. IV. p. 361, 3th Edition.

“ and

" and contrary to the Liberty and Custom
 " of the Realm of England: for, as *Sir*
 " *Matthew Hale* well observes, it would be
 " a most unhappy Case for the *Judge him-*
 " *self*, if the Prisoner's Fate depended upon
 " his Directions: unhappy also for the *Pri-*
 " *soner*; for, if the Judge's *Opinion* must
 " rule the Verdict, the Trial by Jury would
 " be useless."

The Authority of Judge Forster has also
 been quoted by the Opposers of Mr. Fox's
 Libel Bill, to prove that Juries are not to
 decide upon *Matter of Law*. " The Con-
 " struction," (says Judge Forster) " which
 " the Law putteth upon *Facts, stated and*
 " *agreed, or found by a Jury*, is in all Cases
 " undoubtedly the proper Province of the
 " *Court*." But, by "*Facts stated and agreed,*
 " *or found by a Jury*," Forster evidently
 means the Case of a *Special Verdict*; in-
 asmuch as there are no specific *Facts*
found in a *General Verdict*, which is simply

H

Guilty,

Guilty, or else *Not Guilty*. And whoever doubted, but that, in the case of a *Special Verdict* (that is to say, in the Case where a Jury *chuse* to leave to the Court the Decision of the *Law*), it is the *proper Province of the Court* to decide upon it?

In the Year 1777, an Information was filed *ex officio* by his Majesty's then Attorney General (now Lord Thurlow), against Mr. *Horne* (now Mr. Horne Tooke) for publishing an Advertisement respecting a Subscription "to be applied to the Relief of
 " the Widows, Orphans, and aged Parents of
 " our beloved American Fellow-subjects,
 " who, faithful to the Character of English-
 " men, preferring Death to Slavery, were, for
 " that Reason only, inhumanly murdered by
 " the King's Troops, at or near Lexington, in
 " North America;" which Advertisement was signed "*John Horne*;" and the *whole* of this Advertisement was inserted in the Information. Mr. Horne was tried before the
 Earl

Earl of Mansfield, who, in his Direction to the Jury, expressed himself as follows :

“ Gentlemen of the Jury, There are *two*
 “ *Points* for you to satisfy yourselves in, in
 “ order to the forming of your Verdict.

“ First, Did he compose and publish ;
 “ that is, was he the Author and Publisher
 “ of it upon this Occasion ? That is entirely
 “ out of the Case, for it is admitted.
 “ Why then, there remains nothing more,
 “ but that which the reading of the Paper
 “ must *enable you to form a Judgment upon,*
 “ superior to all the Arguments in the World.
 “ And that is ; Is the Sense of this Paper
 “ that Arraignment of the Government, and
 “ the Employment of the Troops upon the
 “ Occasion of what happened at Lexington,
 “ mentioned in that Paper ? When you read
 “ that, *you will form the Conclusion yourselves.*
 “ What is it ? Why it is this ; That our
 “ beloved American Fellow-subjects (there-
 “ fore supposing them innocent Men) were

“ in Rebellion against the State. They are
 “ our Fellow-subjects ; but not so absolutely
 “ beloved without Exception ; beloved to
 “ many Purposes, beloved to be reclaimed ;
 “ beloved to be forgiven ; *beloved to have good*
 “ *done to them* ; but, not beloved so as to be
 “ abetted in the Rebellion ; and therefore,
 “ that Paper certainly conveys an Idea that
 “ they are innocent. But further it says,
 “ That they were inhumanly murdered at
 “ Lexington by the King’s Troops, merely
 “ upon Account of their acting like English-
 “ men, and preferring Liberty to Slavery.”
 And again, “ It sets forth, that they are
 “ totally innocent ; that they only desire not
 “ to be Slaves ; they are disposed to be Sub-
 “ jects, but desire only not to be Slaves. Is
 “ that the Use that is made of the King’s
 “ Troops upon this Occasion ? For, you
 “ will carry your Mind back to the Time
 “ when the Paper was wrote ; was it to
 “ reduce them to Slavery ? And, if it was
 “ intended

“ intended to convey that Meaning, there
 “ can be little Doubt whether it is an
 “ Arraignment of the Government, and of
 “ the Troops employed by them ; *but that*
 “ *is a Matter for your Judgment.* You will
 “ judge of the Meaning of it ; you will judge
 “ of the Object to which it is applied, and
 “ connect them together ; and, *if* it is a
 “ CRIMINAL Arraignment of the Troops,
 “ acting under the Orders of the Officers
 “ employed by the Government of this
 “ Country, to charge them with murdering
 “ innocent Subjects, because they would not
 “ be Slaves, *you must find your Verdict one*
 “ *Way ; but, if you are of Opinion,* that the
 “ Contest is to reduce innocent Subjects to
 “ Slavery, and that they were all murdered,
 “ like the Cases of undoubted Murders of
 “ Glenco, and many other Massacres, *then*
 “ *you may form a different Conclusion †.*”

† See this Trial, taken *verbatim* in Short Hand
 by Mr. Blanchard.

In this Instance, Lord Mansfield left completely to the Jury to decide upon the *Criminality or Innocence* of the Act done. No Judge could have given to a Jury a more *constitutional Direction*, than Lord Mansfield did in this Case of the *King against Horne*.

When the Earl of Mansfield presided in the Court of King's Bench, that Court acted in a Manner equally worthy of Notice, in the Case of the *King against Hart*. The Case was this :

Miss Mary Jerom, of Nottingham, had been educated a Quaker, but having absented herself from the Quakers Meetings, and having, in other Respects, displeased the Quakers, that Society at last expelled her ; and *Francis Hart* (as Clerk of the Meeting) signed the Instrument of Expulsion. It recites, " That she had been educated in the " Society, and that she had imbibed erroneous " Notions contrary to Scripture Doctrine, " and, in divers Parts of her Conduct, she had " acted

“acted very inconsistently with a *Life of*
 “*Self-denial*,” &c. (which was rather a *severe*
 Observation upon a *young Lady*)!

She preferred a Bill of Indictment for a Libel, against the Defendant *Hart*. The Cause was tried before Mr. Justice *Clive*, at the Summer Assizes at Nottingham, on the 30th of July 1762.

The Case is reported by Burn, in his Ecclesiastical Law †, and it is there stated, “That the Defendant’s Counsel called no
 “Witnesses, and that he was *restrained* from
 “arguing, that the Paper in Question *was no*
 “*Libel*, by the Judge, who said, that *such a*
 “*Question was more proper to be determined by*
 “*the Court above*. The Jury found the De-
 “fendant *Hart* Guilty. In the Michaelmas
 “Term following, Mr. *Cust* moved the
 “Court of King’s Bench, for a new Trial.

† Vol. II. Page 188, under the Article “*Dis-*
 “*senters*.”

“ The Court was clearly of Opinion, that the
 “ Jury *should have been directed to acquit* †
 “ *the Defendant* ; and they ordered the Ver-
 “ dict to be *set aside*, and a new Trial to be
 “ had.” So that the Verdict was set aside,
 as *illegal*, because the Judge *had not permitted*
 Hart’s Counsel to argue before the Jury *the*
point of Law ; namely, whether the Paper in

† The Judges had probably forgot this Case
 of the *King against Hart*, when they gave in their
 Answer to the third Question put to them by the
 House of Lords, wherein they say, “ We answer,
 “ that upon the Trial of an Indictment for a
 “ Libel, the Publication being clearly proved,
 “ and the Innocence of the Paper being as clear-
 “ ly manifest, *it is competent* and legal for the
 “ Judge to direct or recommend to the Jury to give
 “ a Verdict for the Defendant. But, we add,
 “ that *no Case has occurred* in which it would have
 “ been, in sound Discretion, *fit for a Judge*, fit-
 “ ting at *Nisi Prius*, to have given *such a Direction*
 “ or Recommendation to a Jury.”

Question

Question was, or was not, a *Libel*; and because the Judge, instead of directing the Jury to *acquit* the Defendant, had said, that the Question, of Libel, or no Libel, “*was more proper to be determined by the Court above.*”

Here then, is Lord Mansfield, and the whole Court of King's Bench, decidedly against the Opinion of those who hold, that “*the Province of the Jury is ONLY to try “FACTS.”*” Whether the Earl of Mansfield has always been *consistent* in his Opinions upon this Subject, I shall leave to others to enquire.

In the Case of the *King against the Dean of St. Asaph* (which was an Indictment for a Libel), Mr. Erskine, on behalf of the Dean, moved the Court of King's Bench for a new Trial. The present Chief Justice of Chester, Mr. Bearcroft, although he was Counsel for the Prosecution, did, upon that Occasion, explicitly admit the *Right* of the Jury to judge of the *whole* Charge. Lord Mans-

field interrupted Mr. *Bearcroft*, by saying, that he *supposed* he meant the *Power*, and *not* the *Right*. Whereupon Mr. *Bearcroft*, to his immortal Honour, instantly disavowed that Explanation, and said, “ I did *not* mean
 “ merely to acknowledge that the Jury have
 “ the *Power* ; for, their *Power* nobody ever
 “ doubted ; and if a *Judge* was to tell them
 “ they had it *not*, they would only have to
 “ laugh at him, and convince him of his
 “ *Error*, by finding a *General Verdict*, which
 “ *must* be recorded : I meant therefore to
 “ consider it as a *RIGHT*, as an important
 “ Privilege, and of great Value to the Con-
 “ stitution †.” Such was the Declaration
 of a Lawyer, who is one of the most learned,

† This Circumstance is thus related, in Mr. Erskine's Argument in support of the Rights of Juries, Pages 124 and 125 ; which Argument is printed at the End of the Trial of John Stockdale for a Libel.

most

most experienced, and distinguished Men that ever adorned his Profession.

The Judges, in answer to the sixth Question put to them by the House of Lords, say, “ We have given *no Opinion* to your Lordships which will have the Effect of taking *Matter of Law* out of a *General Issue*, or out of a *General Verdict*.” And again, they say, “ *And we disclaim the Folly* of endeavouring to prove, that a Jury, who can find a *General Verdict*, cannot take upon themselves to deal with *Matter of Law* arising in a *General Issue*, and to hazard a *Verdict* made up of the *Fact*, and of the *Matter of Law*, according to *their Conception of the Law*, against all *Direction* by the Judge.”

Here the Judges unanimously disclaim, in the most explicit Manner, the *Folly* of contending, that Juries cannot decide Matters of Law, against all *Direction* by the Judge.

But, in their Answer to the seventh Question put to them by the House of Lords, they say, " That it is the *Duty* of the Jury, if " they will find a General Verdict upon the " whole Matter in Issue, *to compound that* " *Verdict* of the *Fact* as it appears in Evi- " dence before them, *and of the Law* as it " *is declared to them by the Judge.*"

But so far is it from being true, that, by the Law of England, it is the " *Duty* of the " Jury to compound their Verdict of the " *Fact* as it appears in Evidence before " them, and of the *Law* as it is *declared to* " them by the *Judge*;" that, at the Time when it was the Custom to fine Juries in certain Cases, Juries have been actually *fined*, *for agreeing to bring in their Verdict in blind Compliance with the Opinion of the Court in Point of Law*, as well as *for agreeing to cast Lots for their Verdict*, as clearly appears from the following Cases.

In

In the Case of Foster against Hawden, in the King's Bench, reported in Levinz†, "The Jury, not agreeing, *cast Lots* for their Verdict, and gave it according to Lot; for which, upon the Motion of Levinz, the Verdict was set aside, and the Jury was ordered to attend next Term to be fined."

In an Appeal of Murder, reported in Croke††. The Fact, that is to say, the Killing, was *not denied* by the Defendant, but he rested his Defence upon a *Point of Law*, namely, that the Deceased had provoked him, by mocking him, and he therefore contended that it was *not* Murder. All the Court severally delivered their Opinions, that it *was* Murder. The Jury could not agree whether it was Murder, or not; but the

† Part II. p. 205, 2d Edition.

†† Croke Elizabeth, Part I. p. 779.

major Part of them were for finding the Defendant *Not Guilty*. They however, at last, came to an Agreement in this Manner, "*That they should bring in and offer their Verdict Not Guilty; and if the Court disliked thereof, that then they should all change their Verdict and find him Guilty.*" In pursuance of *this* Agreement, the Jury brought in their Verdict *Not Guilty*. The Court, disliking the Verdict, sent the Jury back again; who, in pursuance of the Agreement they had so made, returned and brought in their Verdict *Guilty*. And for this Practice; namely, for having, when they were *not* agreed amongst themselves upon the *Point of Law*, entered into an Agreement to bring in a Verdict, as if they were agreed, and in *blind Compliance* with the Opinion of the Court in *Matter of Law*; the Jury were all fined and imprisoned; except *two* of them who discovered to the Court the *Manner of their Agreement*.

The

The Time is fortunately long since past, when Juries could be fined, at the Discretion of the Court, for their Verdicts ; but how can it be said, by those who pay such high Respect to the Decisions of Courts of Law, that the *Duty* of a Jury is to do *that*, which, when a Jury *did do*, the Court of King's Bench actually *fined them for doing* ? For, in the Case that I have last mentioned, in which the Jury were fined, there was no Question about the *Fact*, but only about *Matter of Law*.

The Law of England unquestionably is, that Juries have not only the *Power*, but also the *Right*, to decide according to their Consciences. It is, moreover, the *Duty* of a Jury to *exercise that Right* ; for, the Law expects, as Lord Chief Justice Vaughan has fully shewn, that they should *not* give a *General Verdict*, in *blind Compliance* with the Opinion of the Court, or Judge, either as to Matter of *Law* or *Fact*, without the *Conviction* of their own Minds : for, if they feel themselves

themselves unequal to decide upon the *Point of Law*, the Law permits them to find the Facts, *without* deciding upon the Law; namely, by finding a *Special Verdict*. And it was admirably said by Earl Camden, that, "If he were summoned upon a Jury to try the Issue upon a Libel, no Power upon Earth should compel him to find a Defendant *Guilty*, unless he were convinced in his own Mind, that the Paper published *were really a Libel*."

There was a Time however, when a Jury might have brought in a Verdict of "*Guilty*," without considering whether the Paper were, or were not a *Libel*; namely, during the Continuance of that scandalous Act of Parliament of the 13th and 14th of King Charles the Second Chap. 33, for regulating *the Press*.

By that Act it was enacted, that no private Person or Persons, shall print, or cause to be printed, any Book or Pamphlet whatsoever,

soever, unless the same be *first* lawfully licensed, and authorized to be printed, by certain Persons appointed by the Act to license the same.

Law Books were to be licensed by the Lord Chancellor, or by one of the Chief Justices, or by the Chief Baron.

Books of History, or Books concerning State Affairs, were to be licensed by one of the Principal Secretaries of State.

Books concerning Heraldry were to be licensed by the Earl-Marshal.

And all other Books, that is to say, all Novels, Romances, and *Fairy Tales*, and all Books about Philosophy, Mathematicks, Physic, Divinity, or *Love*, were to be licensed by the Lord Archbishop of *Canterbury*, or by the Lord Bishop of *London* for the time being: the Framers of this curious Act of Parliament, no doubt, supposing, that those *Right Reverend* Prelates were, of *all* the

such as K. Men

Men in the Kingdom, the most conversant with *all* those Subjects.

That Act commenced in June 1662, and passed only for *two* Years. It was continued by an Act of the 16th of Charles the Second, and by another Act of the 17th Year of the same disgraceful Reign; and in a few Months afterwards it expired. So that *the Law now is* what it would have been, in case that infamous Act of Parliament had *never* passed.

I suspect that much of the *miserable Confusion* of Ideas, that has existed upon this Subject of *Libels*, has arisen from that Act of Parliament having, for a Time, totally altered the Law upon the Subject.

It is no Doubt the Duty of a Jury, in all Cases, to give a clear, distinct, and *unambiguous* Verdict. But, such a Verdict, for instance, as "*Guilty of publishing only*," is an absurd Verdict. It should be considered as a mere Nullity, and as *No Verdict*. Such a Finding

Finding does not fulfil the Engagement which the Jury enter into, when they take their Oath; the Form of which Oath†; in a Criminal Case, is as follows: videlicet; “ You shall well and truly try, and true Deliverance make, between our Sovereign Lord the King, and the Prisoner at the Bar, whom you shall have in Charge, and a true Verdict give according to Your Evidence: so help you God.” Neither is such an imperfect Finding agreeable to their Charge, which directs them “ to enquire whether the Defendant be *Guilty* of the Crime *whereof* *he* stands indicted, or Not Guilty.” A Jury ought therefore, to be convinced that the Defendant is guilty of the “ Crime *whereof* *he* stands indicted,” before they pronounce him *Guilty* under any Words of Qualifica-

† The Form of this Oath, as here given, is taken from Burn's Justice, Vol. IV. p. 189. 15th Edit. Article “ Sessions.”

tion: for, there is no *Guilt at all* in publishing an innocent Paper.

In the Case of the *King against Simons*, (upon a Rule to shew Cause why a New Trial should not be had) it was laid down by Mr. Justice *Denison*, as reported by *Sayer* †, that “ If the Verdict had been “ taken as the Jurors intended to give it, “ namely, *Guilty of the Fact, but without* “ *any evil Intention,*” it would have been an “ incomplete Verdict; and consequently no “ Judgment could have been given upon “ it.”

And Lord Coke, in his *Institutes* ††, says, that “ A Verdict finding Matter *uncertainly* “ or *ambiguously* is insufficient, and no Judgment shall be given thereupon.”

If a Jury therefore be convinced, that a Defendant has *only published*, and be not convinced that the Thing published is of the

† Page 36.

†† First *Institutes*, p. 227.

criminal Nature and Description set forth in the Indictment or Information; the Jury ought neither to bring in their Verdict "*Guilty of publishing,*" nor "*Guilty of publishing only;*" but it is their Duty to bring in an unambiguous and direct Verdict of "*Not Guilty.*"

It is also the Duty of a Jury, to find a *General* and not a *Special Verdict*, if they feel themselves competent to decide the *Law* upon the Case. Their finding a *Special Verdict*, unless they feel themselves unequal to determine upon the *Points of Law*, is *shrinking* from that Duty which, by their Oath, they undertake to perform.

The *Juries*, in the Cases of the King against *Lilburne*;—of the King against *Perrin and Meade* (where *Busbell* was upon the Jury);—of the King against *Stockdale* who was prosecuted for a Libel;—of the King against *Owen*; and in many other Cases, have done themselves everlasting Honour, by taking
upon

upon themselves to decide *Law* as well as *Fact*, according to the true Spirit of our free Constitution. *Owen* was a Bookseller, and was prosecuted by Information in the Year 1752, by the then Attorney General, for a Libel: the Direction of Lord Chief Justice *Lee* to the Jury, does not appear at full Length in the State Trials. However, it appears, that the Chief Justice “ declared it “ as his Opinion that the Jury ought to find “ the Defendant Guilty.” The Jury brought in their Verdict *Not Guilty*. And it appears by the State Trials †, that after the Verdict of *Not Guilty* was given, “ the Jury went away; “ but, at the Desire of the Attorney General, “ they were called into Court again, and “ asked this leading Question, viz. Gentle- “ men of the Jury, do you think the Evidence “ laid before you, of *Owen’s* PUBLISHING

† Vol. X. p. 208 of the Appendix.

“ the

" the Book by selling it, is not sufficient to con-
 " vince you, that the said Owen DID sell this
 " Book?"

" Upon which the Foreman, without an-
 " swering the Question, said, *Not Guilty*,
 " *Not Guilty*: and several of the Jury said,
 " *That is our Verdict, my Lord, and we abide*
 " *by it.* Upon which the Court broke up,
 " and there was a prodigious Shout in the
 " Hall."

The *State Trials* have sometimes been
 pleasantly termed "*Libels upon the Judges.*"

A curious Argument has been used to
 prove that Juries are to *try Facts only*; vi-
 delicet, that *Verdict* comes from *veridicere*,
 which means, it is said, "*to find Facts:*"
 therefore, it is logically concluded, that Juries
 are only to *try Facts*; as if, indeed, the *Rights*
of the People were to rest upon *Latin Ety-*
mologies! whereas, *veridicere* does not signify
 "*to find Facts;*" but "*to speak the Truth.*"

Consequently, *Verdict* signifies to *speak the Truth respecting the Matter in Issue*. But the *Matter in Issue* is not whether the *Act* were, or were not, committed ; but whether the Defendant be *Guilty*, or *Not Guilty*. That is the *Thing in Issue*. The Persons, therefore, who argue in this Manner, are mistaken in *Fact*, as well as in *Law*.

It has been said by the Enemies of Mr. Fox's Libel Bill, that " As the Law is the Rule of *all* Men's Actions, it should therefore be decided by the Judges : otherwise, there will be *one Law* for *Cumberland*, and another for *Cornwall*." It is rather singular, that *these two Counties* should, as it were by mere Accident, have been named ; as they lead us to draw a direct *opposite* Conclusion.

At the *Carlisle* Assizes, some years ago, the Judge (who was either Mr. Justice *Asbush*, or Mr. Justice *Willes*) asked a Witness what was the Meaning of a *Word* that the Witness had

had made Use of, and which the Judge said that he did not understand. The Answer the Judge received was a loud *Burst of Laughter* from all the People in the Court-House; and yet the Judge had said nothing that was ridiculous, for he only asked the Explanation of a *Word* used in *Cumberland*, but which was not used in many other Parts of England. The People of *Cumberland*, however, who *all* understood this *Word* perfectly, thought this so extraordinary a Question, that they immediately burst out a-laughing in the Judge's Face.

It so happens, that this *very Word* is used by the People in the County of *Cornwall*, in a Sense totally *different*.

Now, let us suppose a Paper to be published in *Cornwall* with this *Word* in it; and another Paper, Word for Word the *same*, to be published by another Person in the County of *Cumberland*, some time after.

L

If

If by Law, the Jury were *bound*† to find a Defendant *Guilty*, upon the mere Proof of the *Publication* of the Paper charged to be a Libel, and to leave to the Court to decide upon the Criminality or Innocence of the Defendant (according to this Idea of *Uniformity*), this is what would happen, *if* there were *no Innuendoes* in the Indictment or In-

† At the Trial of the Dean of St. Asaph, at the Shrewsbury Assizes, in August 1784, Mr. Justice Buller, in his Directions to the Jury, said, "The Matter appears upon the *Record*, "and as such it is not for me, a single Judge, "sitting here at *Nisi Prius*, to say, whether "it is, or is not, a *Libel*." And again, "There "is no Contradiction as to the *Publication*, and "if you are satisfied of this in Point of *Fact*, "it is my Duty to tell you, that in Point of *Law* "you are *bound* to find the Defendant *Guilty*."

See the Trial, as taken in Short Hand by William Blanchard, p. 26, 27, and 28.

formation :

formation: the Man who published *first*; namely, he who published the Paper in *Cornwall*, might in reality be guilty of a gross *Libel*; and being *guilty*, would be punished as such, and the Judgment recorded. Whereas, the other Man, who published a *similar* Paper afterwards in *Cumberland*, with this very *same Word* in it, might be perfectly *innocent*; inasmuch, as this *same Word* has in *Cumberland*, a totally *different Meaning*. Yet the Judges, finding the former Judgment upon Record, would consider themselves bound to follow the Precedent before them. Consequently, the latter Defendant (though in fact innocent) would be found *Guilty*! So much for this System of *Uniformity*.

Whereas, if these *two* Persons, who published these Papers, in those two Counties respectively, were to be tried, as I contend that by the Law of England they must be

tried, that is to say, by *Juries* in those respective Counties; the guilty Man, namely, he who *had* published a Libel in *Cornwall*, would, by a Cornish Jury, be found *guilty*; and the innocent Man, namely, he who had published the same Paper in *Cumberland*, but who had *not* published a Libel, would, by a Cumberland Jury, be (as in justice he *ought* to be) *acquitted*. For, those two Juries would interpret those Papers, in those different Counties, according to their true Sense and *Meaning* † in each respectively.

† In the Case of the *King against Horne*, on a Motion in *Arrest of Judgment*, Lord Mansfield said, "It is the Duty of the Jury to construe plain Words, and clear Allusions to Matters of universal Notoriety, according to their *obvious* *Meaning*, and as every Body else who reads must understand them." See Cooper's Reports, p. 680.

The

The Judges, in answer to the fifth Question put to them by the House of Lords, say,
 “ The *Sense* of a threatening Letter, or of
 “ any other Words reduced to Writing, is no-
 “ thing more than the *Meaning* which the
 “ Words do, according to the *common* Accep-
 “ tation of Words, import, and which every
 “ Reader will put upon them. *Judges* are,
 “ in this Respect, but *Readers*.”

And again, “ *Judges* have no Means of
 “ knowing Matters of Fact *dehors*” (that is,
 out of) “ the Paper, but by the *Confession*
 “ of the Party, or the *Finding* of the Jury :
 “ But they can collect the intrinsic Sense
 “ and Meaning of a Paper, in the same
 “ Manner as other Readers do ; and they
 “ can resort to *Grammars* and *Glossaries*, if
 “ they want such Assistance.”

I highly approve of these very pointed Words of the Judges ; for, it is perfectly true, that as to discovering the *Sense* of any

Words reduced to Writing, "*Judges are but Readers.*" Consequently, the *Jury* can read the Words, and can understand the *Sense* as well as they can; and perhaps frequently *much better*, as in the Case of the two Counties I have just instanced. In such Cases, "*Grammars and Glossaries*" would be useless.

When a Libel is obscurely written, there are often *Innuendoes* inserted in the Indictment or Information; as, for instance, in the Case of the *King against Stockdale*, "*Mr. Hastings*" was mentioned in Mr. Stockdale's Publication. Now, in order to shew *who* was meant, it was in the Information, explained, by saying, "*Mr. Hastings (meaning thereby Warren Hastings Esq. late Governor General of Bengal).*" An *Innuendo* therefore is, in fact, nothing more than an *Averment of the Meaning* of any particular Expression. Now, it is *admitted*, that it is *invariably* left to the Jury to decide, whether
the

the *Sense* † affixed to the different Passages,
by the *Innuendoes*, be, or be not, fairly affix-
ed

† See the Direction given to the Jury by Lord Chief Justice *Kenyon*, in the Case of the *King against Stockdale*; and also the Direction of Mr. Justice *Buller*, in the Case of the *King against the Dean of St. Asaph*.

It is true, that the Judges, in their Answer to the fifth Question put to them by the House of Lords, respecting the Case of a threatening Letter, say; "If they" (the Judges) "could resort to a Jury to *interpret* for them in the first Instance, who shall *interpret the Interpretation*, which, like the threatening Letter, will be *but* Words upon a Paper?" But, these Words of the Judges *obviously* cannot apply to the case of a *General Verdict*; inasmuch as in that Case, the Words "*Guilty*," or "*Not Guilty*," want *no Interpretation*. Whereas, in the Case of a *Special Verdict*, the Jury, when they find the *Facts*, must find whether the *Sense* of the Paper be
the

ed to them. So that, in Cases of great Difficulty, the Judges leave to the Jury the finding of the Sense; but, where there are no *Innuendoes*, and consequently no Difficulty, Juries are deemed, by those who would restrict their Rights, to be totally incompetent to decide, whether the Publication be, or be not, a *Libel*! Every One must be struck with the palpable Absurdity of this Doctrine.

the same as that put upon it by the *Innuendoes*; which Interpretation (it is true) is "but Words upon a Paper." It is therefore probable, that the Judges meant to point out a new Objection to a Jury finding a *Special Verdict*, in the Case of a threatening Letter, in the Case of a *Libel*, or in any other similar Case, if the Jury feel themselves competent to decide the Law; inasmuch as (according to the above-mentioned Notion) a *Special Verdict*, when there are *Innuendoes*, requires an Interpretation of the Interpretation, which a *General Verdict* obviously does not.

Let

In considering this important Question, it is proper to recollect what Sort of Judges we have had in this Country, in former Times.

In the unfortunate Reign of King Charles the First, the Judges were asked by the King, whether he could, by Law, levy *Ship-Money* without Consent of Parliament, in *Cases of Necessity*. To which the Judges answered, that in *Cases of Necessity* he could ; and they very complaisantly added, “ *And of that Necessity your Majesty is the sole Judge.*”

In the Reign of King Charles II. *Scroggs*, that infamous Chief Justice of the King's Bench, and all the other Judges, declared under their Hands, “ *That to print or publish any News book, or Pamphlets of News whatsoever, is illegal*; that it is a manifest Intent to the Breach of the Peace, and they may be proceeded against by Law for an *illegal Thing*†.”

† See Chief Justice *Scroggs*'s Direction to the Jury, at the Trial of Henry Carr for a Label ; in

At the Trial of the Seven Bishops, in the Reign of King James the Second, that Wretch Mr. Justice *Allybone* asserted, that the Law respecting *Libels* was as follows: “ I “ think” (says he) “ in the *first* Place, that “ no Man can take upon him to write against “ the actual *Exercise* of the Government, “ unless he have Leave from the Government, “ but he makes a Libel, be what he writes “ true or false ; for, if once we come to im- “ peach the Government by way of Argu- “ ment, it is the Argument that makes it “ the Government, or not the Government ; “ so that, I lay it down that in the *first* Place, “ that the Government ought not to be im- “ peached by *Argument*, nor the Exercise of

the State Trials, Vol. III. That Trial was in the Year 1680, and was therefore, several Years after the unconstitutional Act of Parliament for regulating the Press had expired.

“ the Government shaken by *Argument* ; be-
 “ cause I can manage a Proposition in itself
 “ doubtful, with a better Pen than another
 “ Man : this, say I, is a *Libel*. Then I lay
 “ down this for my *next* Position, that *no*
 “ *private Man* can take upon him to write
 “ concerning the Government at all†.”

In the Reign of King James the Second,
 the Judges were of Opinion, that the King
 might *suspend* and *dispense with* Laws, by
 virtue of his Regal Authority ; that Money
 might be levied for the Use of the Crown,
 without Grant of *Parliament* ; that Subjects
 might be *prosecuted* for petitioning the King ;
 that a *Standing Army* might be kept up in
 Time of Peace, without Consent of *Parlia-*
ment ; that it was lawful to *disarm* the Peo-
 ple ; that it was not illegal to require exces-
 sive Bail, nor to impose excessive Fines, nor

† State Trials, Vol. IV.

to inflict cruel and unusual Punishments; and (what would be almost beyond Belief, if it were not recorded in the Bill of Rights †), that “ *Grants and Promises of Fines and Forfeitures*” might legally be made “ *before any Conviction or Judgment against the Persons, upon whom the same were to be levied!*” Would it not then be intolerable to leave to Judges appointed by the Crown, to decide the Fate of Persons who are accused?

But we are told that there is a Remedy; namely, a *Writ of Error*, to the House of Lords.

Can it be seriously meant, to throw upon that House such an odious Task, as that of deciding the Fate of every unfortunate Criminal in this Kingdom? This would extend to all Cases of Felony, and of High Treason. And I have already given an Instance, in

† Act 1st William and Mary, Sect. 2. Chap. 2.

which a Person may be indicted for High Treason for a Publication. Besides, how could it be possible to bring such a *multiplicity* of Trials to a Conclusion in the House of Lords, when the single Trial of Mr. Hastings still remains unfinished, after having been depending for so many Years.

But to this Remedy by *Writ of Error*, there is another insuperable Objection. For, according to the System of those who opposed Mr. Fox's Bill, if there be no *Innuendoes*, and if the *Fact of Publication* be either admitted or proved, the Defendant ought, at all Events (say they) to be found Guilty. It is also maintained, that the *Matter of Law* may afterwards be discussed "in the Court from which the Record at *Nisi Prius* was sent, in Courts of Error, and before the House of Lords in the *dernier Recort* †."

† See the Answer of the Judges to the third Question put to them by the House of Lords.

Now

Now, all this Time (perhaps for Years), the Defendant is to *remain in Custody* †, whilst the *Question of Law* is to be thus notably decided ; although, in the End, it may turn out that there is no *Criminal Matter* whatever in the Paper published ; and although the *Jury* were *perfectly convinced of it*, at the time of the Trial !

However gross this Absurdity may appear, there is a still more striking Objection to

† If a Prisoner be *innocent*, he ought to be *acquitted* upon his Trial ; and upon Acquittal, *immediately discharged* : for, by the Act of the 14th George III. Chap. 20, §. 1, it is “ Enacted, that
 “ every Prisoner who now is, or hereafter shall
 “ be, charged with any Felony or *other Crime*,
 “ or as an Accessary thereto, before any Court
 “ holding criminal Jurisdiction, who, on his or
 “ her Trial, shall be *acquitted*, shall be *immediately*
 “ *set at large* in open Court.”

this

this Remedy by *Writ of Error*; for, if a Defendant were to be condemned by the Court, to stand in the *Pillory* for a Libel, and were thereupon to bring his *Writ of Error* to reverse the Judgment; he would nevertheless (according to the decided Opinion of some of the ablest Lawyers in this Kingdom) be to stand in the *Pillory*, *before* the Matter could be brought to a Hearing upon his *Writ of Error*; for, the *Writ of Error* is no *Superfedeas*, or *Stop*, to the *Sentence* of the Court. So that, an *innocent* Man is *first* to suffer, and *afterwards* to be found *Not Guilty*! So much then, for this *admirable* Remedy by *Writ of Error*!

But we are told that the Defendant has another, and a prior Remedy, namely, by *demurring* to the Indictment. “ This is incident to criminal Cases, as well as civil, “ when the *Fact*, as alledged, is allowed to be “ true, but the Prisoner joins Issue upon “ some

" some *Point of Law* in the Indictment, by
 " which he insists that the *Fact*, as stated,
 " is no Felony, Treason, or whatever the
 " Crime is alledged to be. Thus, for In-
 " stance, if a Man be indicted for *feloniously*
 " stealing a Greyhound, which it is not Fel-
 " ony to steal: in this Case the Party in-
 " dicted may *demur* to the Indictment; de-
 " nying it to be Felony, though he *confesses*
 " the *Act of taking it*†."

A Defendant, therefore, in order to be per-
 mitted to try the *Point of Law* upon *Demur-
 rer*, in this Case, must, although he never
 stole the Greyhound, begin by *confessing him-
 self a Thief*.

In like Manner, a Man indicted for pub-
 lishing a Paper charged to be a *Libel*, but
 which Paper was *no Libel*, could not try that

† Blackstone's Commentaries, Vol. IV. Pages
 333 and 334. 8th Edition.

Point of Law, without first admitting the *Fact* of Publication. But it might be, that he had good Reasons for not admitting that he was the Publisher. He would consequently, be deprived of trying the *Point of Law* upon *Demurrer*.

But it has been said by those who ought to have known better, that if a Man demurs to an Indictment, and the Law is thereupon adjudged to be against him, *final Judgment* will not be given against him; but that he may still be tried by a Jury, and that his having admitted the *Fact* upon *Demurrer* will not preclude the Jury from acquitting him, as the Court will not record the Confession. Whereas, it is said by Hawkins, in his *Pleas of the Crown*, † “ That in criminal Cases, not capital” (as for Instance, in the Case of *Libel*) “ if the Defendant demur to an Indictment, &c. the Court

† Vol. II. p. 471. 6th Edit.

“ will not give Judgment against him to answer over, but *final* Judgment.”

This then, is the *incomparable* Remedy, by *Demurrer*, which we are told the Defendant has !

The humane Spirit of the Law of England has given to every Defendant, who is accused before a Grand Jury, THREE GUARDS to protect him against an *unjust* Judgment ; independently of a *Demurrer*, and of the *Writ of Error*.

First, the *Grand Jury*, who may throw out the Bill.

Secondly, the *Petit Jury* who may acquit the *Defendant*, either when the Proof as to Matter of *Fact* is insufficient, or when they deem the *Law* to be for the Defendant.

Thirdly, the *Court*, who may grant the Defendant a *New Trial*, or who may *arrest* the Judgment.

A *New Trial* may be granted by the Court, in the Case of *Conviction* ; for, if the Court think

think that Justice has *not* been done to the Defendant, it is proper there should be a *Jury of Revision*. But if a *New Trial* were granted in the Case of *Acquittal*, under Pretence that the Court *differed in Opinion* from the Jury; this most intolerable Absurdity might follow; videlicet, that the Defendant *might* be finally found *Guilty* (and in a capital Case, even lose his Life), although no less than Twelve Men, namely the *first* Jury, had upon their Oaths, *unanimously* pronounced him *Innocent*; which would be contrary to the first Principles of the Law of England.

But if the *Second* Jury should also *acquit* the Defendant, then, upon the same Principles, the Court might grant a *third*, or even a *fourth* Trial. So that, at this Rate, as Lord Camden judiciously observed, “*A Defendant could never be finally acquitted.*”

“Whenever the Defendant,” says Blackstone†, “appears in Person, upon either a capital or inferior Conviction, he may at this Period, as well as at his Arraignment, offer any Exceptions to the Indictment, in Arrest or Stay of Judgment; as for want of *sufficient Certainty*, in setting forth either the Person, the Time, the Place, or the Offence. And if the Objections be *valid*, the whole Proceedings shall be *set aside*; but the Party may be *indicted again*.” So that upon a Motion in Arrest of Judgment, the Court may decide on the Regularity of the Proceedings, and whether there appears A CRIME set forth in the Indictment or Information, and whether the same be *sufficiently charged*. For, if there be NO CRIME *sufficiently charged* in the Record, the Defendant ought *not* to have

† Blackstone's Commentaries, Vol. IV. Chap. 29th. p. 375; 8th Edit.

Judgment pronounced against him thereupon. It is therefore highly proper that the Court should have *this Right*, as it is for the *Advantage* of the Defendant.

A Defendant is by Law entitled to *all the several Securities* above mentioned, and must therefore be deprived of *none* of them. Whereas, in *all Cases* where the Criminality or Innocence of a Defendant may happen to turn upon *Matter of Law*, those Persons who hold that the Fate of the Defendant, must depend upon the *Decision of the Court*, would, in Fact, *deprive* him of *One* of his **THREE GUARDS**, and *that* his **BEST**; namely, his Right of being tried by his *Peers*, which is the *Glory* of the English Law; of that "*most transcendent Privilege*" (as Blackstone † admirably terms it) "which *any Subject* can enjoy, or wish for, that

† Blackstone's Commentaries, Vol. III. Chap. xxiii. p. 379. 5th Edit.

“ he cannot be affected either in his Proper-
 “ ty, his Liberty, or his Person, but by the
 “ *unanimous Consent* of twelve of his Neigh-
 “ bours and Equals. A Constitution, that
 “ I may venture” (says he) “ to affirm, has,
 “ under Providence, secured the just Liber-
 “ ties of this Nation for a long Succession of
 “ Ages.”

But, it may be said, that a Defendant has
 not those *three Guards*, in every Case; for, that
 when he is prosecuted by *Information*, there
 is no *Grand Jury*; to which I answer, that
 for that very Reason, it is the more essen-
 tial to uphold the Authority of the Jury that
 remains.

We should also remember, that it is *not*
 necessary for the *Judges* in a Court of Law
 to be *unanimous*; but that a *Jury* must. *This*
 is, perhaps, one of the most excellent Parts
 of that admirable Institution. A great Law-
 yer, whom I can never think of without Ve-
 neration, nor mention without Respect, the
 late

late Lord *Ashburton*, made an Observation upon the Law requiring *Unanimity* in Juries, which was the Result of great Wisdom, Experience, and Attention. He said, that he had frequently observed from the Countenances of a Jury, that the major Part of them were carried away by a sudden Impulse, as it were, from something that was said by the Witnesses or Counsel; and that *sometimes* that Impression was a *wrong* One. But, that he had observed one or more sensible Men upon the Jury (as it was likely there should be out of such a Number) who were *not* carried away by such wrong Impression; and that afterwards a *right* Verdict was brought in: which proved, that, as the *Majority* of the Jury *could not* bring in a Verdict without the Concurrence of the rest, the more *sensible* Men had by Argument, brought over the others to their Opinion. *This*, therefore, was the *good Effect*, that re-

litted from the *Unanimity* which the Law requires.

This Observation is of the more value, as it came from a Man of the first Eminence in his Profession, of uncommon Acuteness, Depth of Thought, and Knowledge of Mankind.

Lord Hale, in his admirable Book of *the History of the Common Law*†, speaking of the sundry Advantages of the *Trial by Jury* which he sets forth in detail, says, “It has
“ the *unanimous* Suffrage and Opinion of
“ Twelve Men, which carries in itself a
“ much greater Weight and Preponderation
“ to discover the *Truth* of a Fact, than any
“ other Trial whatsoever.”

Those who contend, that “*the Province of the Jury is ONLY to try FACTS,*” are nevertheless obliged to admit, that a Jury may give a *General Verdict* of Guilty, or

† Page 260. 3d Edit.

Not Guilty, upon the *whole Matter* put in Issue, "if they *please* to do it."—If it be meant thereby, that the Jury *may* do it legally; that is saying, in other Words, that the Jury have the *Right* to do so. But, if it be meant that they *cannot* do it without acting *illegally*; then, why are they never punished for so acting? It is because, by Law, they *cannot* be punished for so doing. The Court cannot punish them, neither by Fine, nor *Imprisonment*: *Busnell's Case* has completely settled that Point; and it has now been at rest for above an Hundred Years. They cannot be punished by *Attaint* for acquitting a Defendant *contrary to the Directions* of the Court or Judge. For, Lord Chief Justice *Vaughan*, and the Earl of *Mansfield*, have both declared, that *an Attaint for the King* is contrary to Law.

There have been numerous Instances of Juries *acquitting* Defendants, directly *contrary* to the Opinion and Directions of the
 O Court,

Court, or Judge. Yet, no Court can touch a *Hair of the Head* of any one of them.

But perhaps we may be told, that, although the Jury *would act illegally*, by acquitting a Defendant contrary to the Directions of the Judge, yet that, by Law, he *cannot punish* them. Surely, no Man will *fool* the Law of England, as to tell us, that a Jury has a *legal* Right to do *wrong*, a *legal* Right to *act illegally*, and to *usurp* the lawful Authority of Judges *with impunity*. The *Common Law* of England is *not* a Law of *Folly*; but a Law of *Wisdom*. It has been so considered by Lord *Coke*, Lord *Hale*, and by the ablest Men in all Ages. Now, it is a well-known *Maxim* of the Law of England, that there is "No Wrong without a Remedy:" and consequently, that there can be no *Usurpation* without *Punishment*. Therefore, as there is no legal Punishment for a *Jury* in the Case that I have just mentioned, it is a Proof that there is no *Usurpation*,
when

when a Jury take upon themselves to decide upon Matter of *Law*, as well as upon Matter of *Fact*.

There is one Authority against the Principle of leaving to Juries the Decision of Matter of *Law* upon the General Issue, or Plea of *Not Guilty*, which has not been quoted by any of the Opposers of Mr. Fox's Bill; I mean no less a Man than a Chief Justice of the King's Bench, my Lord Chief Justice Jefferies. For, upon the Trial of *Algernon Sidney*, who was tried for High Treason, for a supposed Conspiracy against the Life of the King, and for other Acts of Treason; Colonel *Sidney* said, " They have
 " proved a Paper in my Study of *Caligula*
 " and *Nero*; this is compassing the Death
 " of the King is it?" Lord Chief Justice *Jefferies* then said, " That I shall tell the
 " Jury. The Point in *Law*, you are to take
 " from the Court, Gentlemen. Whether

"there be *Fact* sufficient, *that is your Duty*
 "to consider†."

And in the Case of the *King against Sir Samuel Barnardiston*††, this same Judge *Jefferies* said to the Jury, "*The Proof of the Thing itself* proves the evil Mind it was done with. If then, Gentlemen, you believe that the Defendant Sir Samuel Barnardiston, *did write and publish*††† these
 "Letters,

† See State Trials, Vol. iii. P. 805, 3d Edit.

In the first Year of William and Mary, an Act of Parliament passed for *annulling and making void* the Attainder of Algernon Sidney, on account of the *Judge's Misdirection* to the Jury. Algernon Sidney was therefore, *unjustly* deprived of his Life by that abominable Judge.

†† State Trials, Vol. iii. p. 940, 3d Edit.

††† Let the Reader compare this Direction of Judge Jefferies with the Principle of Mr. Fox's *Libel Bill*, which is, that on every Trial for the making or publishing any Libel, the Jury *may* give a *General Verdict* of Guilty or Not Guilty upon

" Letters, *that* is Proof enough of the Words
 " *maliciously, seditiously and factiously*, laid in
 " the Information †."

upon the *whole* Matter in Issue ; and shall not be required or *directed*, by the Court or Judge, to find the Defendant *Guilty*, merely on the *Proof of the Publication*, and of the *Sense* ascribed to the same in the Indictment or Information.

The Reader will do well also carefully to compare that *declaratory* Bill (*now* an Act of Parliament), with Lord Chief Justice *Kenyon's* memorable Direction to the Jury, in the Case of the King *against Stockdale*, as taken in Short Hand by Joseph Gurney, and printed for Stockdale ; pages 112 and following.

† Lord Chief Justice *Jefferies*, that *passionate*, and *execrable* Judge, closed that flagitious Direction to the Jury, in the following extraordinary Words ; viz. " These Men that carry Sheep's Cloathing, pretend Zeal and Religion ; but, " their *Insides* are Wolves. They are Traitors in " their *Minds*, whatsoever are their outside Pretences." *State Trials*, Vol. iii. p. 943, 3d Edition.

There never was a more infamous Principle, than that here laid down by Judge *Jes-fries*; namely, that “ *The Proof of the Thing* “ *itself* proves the *evil* Mind it was done “ with.” A Principle worthy of the Man. Apply it, for Instance, to the Case of *Homicide*. Does *the Proof of the Killing* prove the *evil* Mind it was done with? Does it prove that it was *Murder*? This Principle is equally execrable in the Case of *Libel*.

This violent and unjust Judge thus *misdirected* those Juries. But there is no wonder that *He* should attempt to take from them their *Jurisdiction*. Now, what is the Argument that is urged in Justification of so Un-constitutional an Attempt. Why, nothing more but that common-place and thread-bare Argument, that “ Judges are *better Judges of* “ *Law* than Juries.” To this I answer, that a wiser and a better Spirit pervades the Law of England. Are the Members of the *House of Lords*, in general, *better Judges of*
Points

Points of Law, than the Judges? Unquestionably not. Yet the Law has said, that the *Majority of that House* (though comparatively illiterate with respect to *Law*) may *reverse* every Judgment of the Judges that is regularly brought before them to be revised; and this, *even* when the Judges are *unanimous* upon the Subject. This Power of the House of Lords is not confined to *easy* Questions (such as Cases of *Libel*), but extends to the most abstruse, and complicated Questions, respecting Tenures, Inheritance, and Title to Civil Property, and to the most difficult *Points of Law* that can possibly be imagined. Why, then, has the Constitution made such Men, even upon *such* Questions, *superior* to the Judges? Because the Constitution, though it values great *Learning* much, values great *Impartiality*, resulting from *Independence*, more. Therefore, for the very *same* Reason, has the Constitution of England given to *Juries*, who are not (like the Judges

Judges) appointed by the Crown, that Species of legal Pre-eminence above Judges; for which I am now contending.

Besides, Juries are not so illiterate as the Enemies of Mr. Fox's Bill have been pleased to suppose; and upon any Indictment or Information for a Misdemeanor, either Party has, by Law, a Right to have a *Special Jury*† to try the Issue; as may be done in civil Cases.

An ingenious Observation has been made by the present Chief Justice of the Common Pleas; namely, that *Persons acting in the Capacity of Judges* might be ignorant of the *Law*: and he instanced the Lord Mayor of London and the Aldermen, who sit as *Judges* at the Old Bailey; and his Lordship pointedly remarked, that according to the Principles of the Opposers of Mr. Fox's Bill, an *Alderman*, when acting as a *Judge*, was to be

† Act 3. George II. Chap. 25. §. 15.

deemed an *infallible Oracle of Law*, and was to *direct* the Jury; but that, if that *same* Alderman happened to be himself upon a *Jury*, he was then supposed to become immediately *incompetent to judge of any Thing but mere Matter of Fact*.

Two of the great Principles, upon which the Liberty of this Country rests, are these. First, that the People shall be bound by no Laws but those of their *own making*; namely, by those only which shall first have been consented to by their Representatives in Parliament: and this is the Reason for a *Representative Constitution*. Secondly, that the Laws when made, shall, upon every General Issue, be *interpreted* by the Country also, *which Country* † the *Juries* are. Take away from the People, either of these two *fundamental*

† See the Words in the CHARGE to the *Jury*, above-stated.

Pillars of the Constitution, and from that Instant the Nation is *enslaved*.

We ought to be the more anxious to preserve that incomparable Right of the People *the Trial by Jury*, when we consider its Excellence, when compared with any other Species of Trial that has ever been established in any Country. Compare it, for Instance, with the Mode of Trial in our *Ecclesiastical Courts*, or in our Courts of *Equity*, and the Contrast will be striking.

In the Trial by Jury, the Examination of Witnesses is in *Open Court*. In the Courts of *Equity*, and in the *Ecclesiastical Courts*, the Examination of Witnesses is *in private*. In the Trial by Jury, the Witnesses are not only examined, but *cross examined*, in order that the Truth may be brought out ; and, in Cases of Contrariety of Evidence, the adverse Witnesses are frequently *confronted*. Whereas, in the Courts where the Proceedings of the Civil Law are adopted, the Witnesses are examined

mined upon *formal Interrogatories in writing*, which, as Lord Hale † well says, “ preclude
 “ *occasional* Interrogations; and the best
 “ Method of searching and sifting out the
 “ Truth is choaked and suppressed.”

The Expence of a Trial by Jury is greater than it ought to be, or than it need be, if *special pleading* were reformed; which Re-
 form would be an Object of the greatest Consequence, particularly to the poorer Part of the Community. But, that Expence, such as it is, is nothing when compared to the Expence of a Suit in Chancery. I have heard of one Instance of a Dispute about Tithes, that was brought into the *Court of Chancery* to be settled; it was not a Question respecting the Tithe of Corn, Grain, and all other Produce of the Estate, but respecting

† Lord Hale's History of the Common Law,
 p. 255, 3d Edition.

the *Tithe* of a *Part* only of that Produce; namely, *the Tithe of Hay*: and what now would any one suppose, upon a moderate Computation, was the *Expence* to the Parties, of deciding that narrow Question? It was (as I am informed) *only twice the Value* of the *Fee Simple* of the *Whole Estate*! So much for the Economy of a Chancery Suit.

Now, let us compare a Trial by Jury, with a Suit in a Court of Equity, with respect to the *Delay*. A Trial by Jury is, as every body well knows, decided in *One Day*. Are Suits in Chancery concluded in *Days*? No, nor in *Months* either. Suits in Chancery often last (as the Trial of Mr. Hastings upon Impeachment, has lasted) for *Years*; and they sometimes last from Generation to Generation. My Family had a Suit depending in the Court of Chancery in Ireland, which (considering that it was a *Chancery Suit*) was tolerably *soon* ended; for, it lasted *only* about *two and forty Years*.

All

All the Parties died before it was ended: in fact, it never did come to a Conclusion by any Order or Decree of the *Court*; for, though it had continued for upwards of *forty* Years, it ended at last by a *Compromise*. This is what is emphatically termed *Chancery Dispatch*.

This reminds me of a humorous Expression of a Relation of mine, the late Earl of Chesterfield, who happened to be in Company with a Gentleman who mentioned that he had lately bought a Spanish Horse, which was so unruly that he overleaped every Fence about his Grounds; and the Gentlemen said, in joke, that he believed he should be obliged to build a Wall round the Horse to keep him within Bounds; but that, for the present, he had ordered his Groom to put him in his *Court*. "I should advise you to do better," says Lord Chesterfield; "put him into the *Court of Chancery*, and I will warrant you he will never get out."

Lord Hale, in his History of the *Common Law*

Law of England †, speaking of the *Trial by Jury*, says ; “ And as this Method is more
 “ *certain*, so it is much more *expeditious* and
 “ *cheap* ; for, oftentimes the Session of *one*
 “ Commission for the Examination of Wit-
 “ nesses for *one* Cause in the *Ecclesiastical*
 “ Courts, or Courts of *Equity*, lasts as long
 “ as a whole Session of *Nisi Prius*, where a
 “ *hundred* Causes are examined and tried.”

Having explained *some* of the Advan-
 tages of this incomparable Mode of Trial,
 I will now shew, that there is *no Differ-*
ence between a Trial for a Libel, and a Trial for
 any *other* Crime, that can justify a Judge in di-
 recting a Jury to find a Defendant *Guilty* mere-
 ly on the *Proof of the Publication*, and of the
Sense ascribed, in the Indictment or Informa-
 tion, to the Paper published. The pretended
 Ground for the Distinction is, that, in the
 Case of a Libel, “ *the Whole Matter appears*
 “ *upon the Record* ;” and that therefore, the

† Page 260, 3d Edition.

Court can declare the *Law* upon the Matter so appearing.

Now, it often happens that a *Part* only of a Book or Paper published is inserted, as the *Libel*, in the Indictment or Information. And it is admitted, that in *this* Case the *Part omitted* may, when taken together with the *Part inserted*, totally alter the Meaning thereof. As, for Instance, if a *Libel* were inserted in a Pamphlet, which Pamphlet was written for the exprefs Purpose of reprobating that *Libel*; it is obvious, that if that libellous Passage only were inserted in an Indictment, that the *Court* could not see upon the Face of the Record, what was the Meaning of the Pamphlet from which it was taken; and consequently, could not judge from the bare Record, whether the Author of the Pamphlet be, or be not, criminal. Therefore, to say that in this Case, "*the whole Matter appears upon the Record*," is palpably absurd. I take for granted, therefore,

fore, that when it is said, that in the Case of a *Libel*, the *whole Matter appears upon the Record*, it is meant, that it so appears, *when the Whole of the Paper published* is in the Indictment or Information ; and that when the *Whole Matter so appears upon the Record*, then the Court can declare the *Law* upon the Matter so appearing. If this be what is meant ; then it would follow, that it would depend upon the *Special Pleader* who draws the Indictment or Information (or even upon his Clerk) to decide, *whether* the Matter of *Law* should be determined by the Court, or by the *Jury* ; namely, by putting in such Indictment or Information, the *Whole* or a *Part* only, of the Paper published ; which is, I think, as preposterous an Idea as any I ever heard !

But I will demonstrate, that in the Case of a *Libel*, it may often happen, even where the *Whole of the Paper published* IS upon the *Record* ; yet, that the *Whole Matter* is NOT
upon

upon the Record. I will suppose an *Hand-bill* to have been distributed in the Streets of London, by the Defendant; and that that Fact is *not* denied by him. I will even suppose that the Defendant brings *no Witnesses* at his Trial; but, that he rests his Defence entirely upon the Case as made out by those who conduct the *Prosecution*. And let me suppose that the *Hand-bill* so set forth in the Indictment or Information, be worded as follows, *videlicet*:

“ TO THE ENEMIES OF POPERY.

“ Now is the Time for you to do Justice
 “ to yourselves, by taking up arms; and by
 “ fighting, like brave Men, the Enemies of
 “ the Protestant Cause.”

(Signed)

“ A TRUE PROTESTANT.”

This would appear upon the *Face of the Record*, to be a most *seditious Paper*; inas-

Q

much

much, as it calls upon a certain Description of the People, namely, upon the "*Enemies of Popery,*" to *take up Arms*; and *that*, not for any legal Purpose (such, for Instance, as supporting the Civil Power); but for the Purpose of "*fighting the Enemies of the Protestant Cause.*"

The obvious Meaning, therefore, of such an Hand-bill would appear to be, that Protestants were invited to destroy Roman Catholics; which is no Doubt as wicked, and as infamous a Thing as can well be imagined. That is to say, it is a Solicitation to commit such scandalous and atrocious Acts as were committed in the Year 1780, when the Chapels of the Roman Catholics were destroyed; the worthy Sir George Saville's House was attacked; when Lord Mansfield's House was burnt down; and when London was set on Fire in seventeen Places in one Night.

This then, is the Meaning of this Hand-bill, as it appears upon the *Face of the Record*;

cord; and this would be, if possible, still more clearly its Meaning, if it should come out in Evidence at the Trial, that it had been distributed in London, at the *very Time* that those Enormities were committed.

But, let me now suppose another Case; namely, that the Witnesses called in Support of the Prosecution to prove the Publication of that Hand-bill by the Defendant, were to prove, that at the very Time when the Copies of that Hand-bill were distributed in London by him, it was known there, that a *Popish* Prince had landed in this Country, and was in the Heart of the Kingdom, at the Head of an Army, and was advancing towards the Metropolis, to overturn the Government, to wrest the Crown from the Hanover Family, to establish Popery, and to destroy the Constitution and Liberties of this Nation. And such a Case, it is well known, did actually exist, when the Pretender was at Derby in the Year 1745.

If such a Fact, for Instance, should come out in Evidence upon the Trial; pray what would *then* appear to be the Meaning of this identical Hand-bill? Why, a Meaning quite opposite to that which, *without this parol and extrinsic Evidence*, it undoubtedly would have.

So little, then, is it true, that *the whole Matter is upon the Record*; that it is manifest that in the Case I have put, the *Criminality or Innocence* would entirely depend upon a *Fact* which is NOT upon the Record.

Now, as it is obvious, that *no just and decisive Inference of Guilt*, can be drawn from what appears in the Indictment or Information; there being Circumstances *essential* to the *Guilt or Innocence* which do not so appear. It consequently follows, that in the Case of a *Libel*, the *Criminality or Innocence* of the Paper, set forth upon the Record as the *Libel*, is NOT (as has been most erroneously maintained) an *Inference of Law* from the
Record;

Record; even in the Case where the *whole of such Paper* IS upon the Record, and “*where no Evidence is given for the Defendant,*”† at the Trial.

It

† The above Observation shews, how exceedingly *ill-conceived* the first Question was, that was moved, by the *Chief Justice of the King's Bench*, to be put to the Judges; videlicet: “On the Trial of an Information, or Indictment for a Libel, is the Criminality or Innocence, of the Paper set forth in such Information or Indictment as the Libel, Matter of *Fact*, OR Matter of *Law*, where no Evidence is given for the Defendant?”

That Question puts the Case of “*no Evidence being given for the Defendant;*” as if it therefore, necessarily left the Defendant without Justification; totally forgetting, that the Defendant may justify himself by *Argument*, or by *cross-examining* the Witnesses for the Prosecution, or even by Facts that may come out upon their *Examination in chief!*

To

It is well said by Lord Hale, in his History of the Pleas of the Crown†, that “ it is
 “ the *Mind* that makes the taking of an-
 “ other’s Goods to be a *Felony*, or a *bare*
 “ *Trespass* only.” No doubt, the *Intention* is a
 principal Consideration: and what a Man’s
Intention is, when he does an Act, is a pure
 Matter of *Fact*, and not Matter of *Law*.
 As for Instance, a Man goes to a Horse-
 dealer to buy a Horse, but desires first to try
 him, for a short Time; however, as soon as
 he is upon his Back, he rides away full

To ask whether the “ *Criminality or Innocence*
 “ of the Paper,” be “ *Matter of Fact* OR *Matter of*
 “ *Law*,” when it is obviously *neither*, but a *Com-*
plex Question of Law AND Fact; is very much the
 same, as if any person were to ask a Chymist,
 whether *Brass* were made of *Copper* OR *Zink*;
 whereas it is *not* made entirely of *either*, but is a
 Compound of BOTH.

† Vol i. p. 508.

Speed,

Speed, and does not return. The Horse-dealer thereupon sends after him, takes him, and indicts him for stealing the Horse. This Man, upon his Trial, does not deny his having gone away with the Horse; but, justifies himself by saying, he had no *Intention* to steal him; for, that *he* did not run away with the Horse, but the *Horse* ran away with him. The *Criminality* or *Innocence*, therefore, of that Man, depends entirely upon that naked *Matter of Fact*.

There was a remarkable Case, of a Man who was tried, some Years ago, at East Grinstead for a *Burglary* †, before Mr. Justice Ashurst; Mr. Erskine was Counsel for

† The Definition of a *Burglar*, as given by Lord Coke, in 3d Institutes, (p. 63, 4th Edit.) and by Blackstone, in his Commentaries (Vol. iv. Chap. 16. p. 224, 8th Edit.) is, "He that, by Night, breaketh and entereth into a Mansion-house, with Intent to commit a Felony."

the Prisoner. The *Faëts* were all admitted, except the felonious *Intention*; for, the Man insisted, that his *Intention*, in entering the House, was to *rescue some Goods of his own*. The Jury, not chusing to decide upon the Matter of *Law*, found all the *Faëts* in a *Special Verdict*, and amongst the rest, stated in their Special Verdict, *as a Faët*, the *Intention* of the Man in entering the House, namely, that it was, “ *to rescue his Goods* †.”

The *Intention*, therefore, being Matter of *Fact*, is *not* within the Province of the Judges, even according to the Principles of those who opposed Mr. Fox’s Bill; for, they have not yet contended that *Faëts* are to be decided by my Lords the Judges.

The forging of a Will, a Bond, a Note of Hand, or a Bill of Exchange, is a capital

† This Fact is stated in Mr. Erskine’s Argument in Support of the Rights of Juries, p. 225. Offence.

Offence. Now, when a Man is indicted for forging a *Bill of Exchange*, for Instance, and the *whole* Bill is set forth *verbatim* in the Record, it is left to the *Jury* to find, whether the Prisoner be, or be not, *Guilty*; although the *Jury*, before they can bring in a Verdict of *Guilty*, must be convinced not only of the *Fact*, namely, that he forged; but that the *Thing forged* was, in the Eye of the *Law*, a *Bill of Exchange*. So here then, the *Jury* decide both *Law and Fact*, although the *whole* Bill of Exchange is upon the *Record*. It is therefore, not to be endured, that a *different* Practice should prevail in the Case of *Libel*.

The present Chief Justice of the King's Bench holds, that "*the Province of the Jury* "is ONLY to try FACTS;" and the withdrawing from the *Jury* the Decision of the Question of *Libel* or *no Libel*, is perfectly consistent with that Principle.—But, how will he, upon *his* Principles, maintain his

R

Consistency

Consistency in having, in the Case of the *King* against *Stockdale*, directed the Jury to judge upon the Point “ *Whether the Defendant, who was charged with having published the Pamphlet, did publish it †?*” What, in the Eye of the Law, is or is not a *Publication*, has often been made a Question; as it was in the famous Case of the *Seven Bishops*, who were tried for presenting a *Petition to the King*; and as it was also, in the Case of *Fitton and Car ††*, who were prosecuted for a Libel.

† See the Trial of John Stockdale for a Libel, taken in Short Hand by Joseph Gurney, and printed for Stockdale, p. 113.

†† “ On Information against them for writing, printing and publishing, a Libellous Narrative and Play called *Pluto furens* of the Lord *Gerrard*; *Car* was agreed to be Guilty of all the Play; and the Evidence against *Fitton* was only, that two or three Copies were found in his Chamber, which *per Curiam* is no *Publication* without discoursing it, or Delivery of it out, and he was acquitted.” See Keble’s Reports, Part ii. p. 502.

If

If a Man were charged with having *published* a Libel upon another, by making an Affidavit in a Court of Justice, or by presenting a Petition to the House of Commons, or by writing and sending a private Letter to a Friend; or were charged with having *published* a Libel upon a Servant, by having given a Character of him in writing; will the Chief Justice pretend to say, that it is there *no Question of Law*, whether the Thing written were, or were not, *published*? Such a Question of Law arises, I maintain, in every *possible Case of Publication*, without exception; although in most Cases, that Question of *Law* is very *easily* decided. Why then, did the Chief Justice of the King's Bench leave to the Jury, in the Case of *Stockdale*, to determine *that* Question of *LAW*, if it be "*the Province of the Jury ONLY to try FACTS?*"

But, even in the Case where a Jury *voluntarily* part with the Decision of the *Law*

to the Court, they still do it in *such a Way*, as to *reserve* to themselves the *Finding of the Verdict*; as clearly appears from the *Form* of a *Special Verdict* †. The Jury, in that Case, first find the several *Facts* specially, and then say as follows, *videlicet*; “ And if, upon
 “ the Whole Matter aforesaid, in Form aforesaid found, it shall seem to the aforesaid
 “ Justices, that” [stating the Question of Law upon which the Jury doubt] “ then,
 “ the Jury aforesaid find upon their Oath,
 “ that the said Defendant is *Guilty* of” [stating the Crime]; “ But, if, upon the Whole
 “ Matter aforesaid, in form aforesaid found,
 “ it shall seem to the aforesaid Justices,
 “ that” [stating the Question of Law, as aforesaid, upon which the Jury doubt];
 “ then, the Jury aforesaid find upon their
 “ Oath, that the said Defendant is *Not*
 “ *Guilty* of” [stating the Crime].

† See Lord Coke's Entries, p. 202. b.

So that in the Case of a *Special Verdict*, the Jury ask the Judges Assistance as *Assessors*, upon those Points of Law *only*, respecting which they *doubt*.

Suppose, an Indictment to be preferred against a Man for *forging* a *Bill of Exchange*, the Whole of which Bill is set forth in the Indictment. Now, there are *two* Points of Law which arise in this Case; either, or both, of which may be the Subject Matter, upon which the Jury may pray the Opinion of the Court, in a *Special Verdict*. The Jury may, either *find* the *Forgery*; and pray the Opinion of the Court, whether the Thing so forged be, or be not, in Law, a *Bill of Exchange*. Or else, the Jury may *find* that it is a *Bill of Exchange*; and pray the Opinion of the Court, whether, under the Circumstances of the Case, it did, or did not, in Law, amount to a *Forgery*.

Therefore, the Jury leaving to the Court, *either* Point of Law at their own Option is a clear

clear and demonstrative Proof, that *if* the Jury think fit, they have a *Right* to decide upon BOTH.

I will now state an Argument which is decisive upon the *Right* of Juries, to determine Matter of *Law*, as well as *Facts*. Blackstone, in his Commentaries †, says, that "it is a *settled Rule* at Common Law, that "no *Counsel* shall be allowed a Prisoner upon his Trial, upon the General Issue, in any Capital Crime, *unless* some *Point of Law* shall arise proper to be debated." And Hawkins says the same Thing, in his Pleas of the Crown ††. The Law has however been altered by Statute †††, with respect to High Treason, and Misprision of Treason. If the Prisoner be a poor Man, and cannot afford Counsel, such is the hu-

† Vol. iv. Chapter 27, p. 355, 8th Edition.

†† Page 400.

††† Act of 7th and 8th William III. Chap. 3.

mane Spirit of the Law of England, that the Court *must assign* him Counsel, who will act for him *gratis*, and argue *Points of Law* before the *Jury*. As, for Instance, if a Man were indicted for *forging a Bond*, which is a Capital Offence ; and if a Question of *Law* were to arise at the Trial, whether the *Bond*, the *Whole* of which is in the Indictment, be, in the Eye of the Law, a *Bond*†, or not : in such Case, the Counsel for the Prisoner must ar-

† The Judges, in their Answer to the first Question put to them by the House of Lords, say, that “ the very few *Particularities* which occur in legal Proceedings upon Libel, are *not* “ *peculiar* to the Proceedings upon Libel, but do “ or may occur in *all* Cases, where the *Corpus* “ *delicti* is specially stated *upon the Record*.” According to this Rule, so expressed ; the Case of *Libel*, and the Case of the *Bond* above put, do (at least in *Principle*) agree ; inasmuch, as *both* are, or may be, “ *upon the Record*.”

gue

gue *that Point of Law* before the *Jury*; but, upon *Matter of Fact*, the Prisoner's Counsel is *not* entitled to be heard. Now, since it is (as *Blackstone* and *Hawkins* state) a *settled Rule of Law*, that Counsel, who cannot speak upon the *Facts*, should nevertheless be allowed a Defendant, expressly for the Purpose of arguing the *Points of Law* before the *Jury*; I appeal to the common Sense of Mankind, whether *that Rule of Law* is not a demonstrative Proof, that *Juries have a Right* to decide upon *Law*, as well as *Fact*.

But it is said by some Persons, that the *Jury* are "to compound their Verdict of the *Fact* as it appears in Evidence before them, and of the LAW as it is DECLARED to them by the JUDGE;" which is as much as to say, that Arguments of Counsel upon *Points of Law*, though addressed to the *Jury*, are *not intended* for the *Jury*, but are only intended for the *Judge* at the Trial, the *Jury* being to take the *Law* from Him: as if it were

were possible, that the Law should intend, that Counsel should address themselves to *Twelve Men*, when it is meant that they should be heard only by *One*; and that *One*, not even one of the twelve! If these Arguments about *Law*, were only intended for the *Judge*, he would not suffer the Counsel to address himself to the *Jury*; but would do, as Lord Mansfield did, in the Case of the *King against Horne*, when his Lordship stopped Mr. *Horne*, who was beginning to address the Jury (not upon a *Point of Law*, but) upon a mere *Point of Practice*. For, as soon as the Information was opened, Mr. *Horne* addressed himself to the Court, in the following Words:

“ My Lord, with your Lordship’s Permis-
 “ sion, I believe it is proper for me at this
 “ Time, before Mr. Attorney proceeds, to
 “ make an Objection, and to request your
 “ Lordship’s Decision concerning a *Point of*
 “ *Practice* ”

" *Practice* in the Proceeding of this Trial.

" Have I your Lordship's Leave?"

To which Lord Mansfield said, "*Certainly.*" Mr. Horne then addressed himself to the "*Gentlemen of the Jury.*" Upon which Lord Mansfield interrupted him and said, "*Not to the Jury.—You are to address yourself with respect to the Regularity of the Proceedings, to Me†.*"

Whereas, on the contrary, when Mr. Attorney General *Thurlow*, and Mr. *Horne* who pleaded his own Cause, came to argue the *Point of Law* before the *Jury*; namely, whether the Paper published was, or was not, a *Libel* (for, the *Publication* was admitted); those Arguments about *Law* were (as they *always* are, in like Cases) addressed to the "*Gentlemen of the Jury;*" and the Judge did *not* call Mr. Attorney General, or Mr.

† See the Trial of John Horne, Esq. taken *verbatim* by Mr. Blanchard, p. 3.

Horne, to order for so doing. Neither did Lord Chief Justice *Kenyon*, in the Case of the *King against Stockdale*, nor Mr. Justice Buller, in the Case of the *King against the Dean of St. Asaph*, interrupt Mr. Erskine although he argued about Law when he addressed the Jury.

In the Case of the *King against Horne* above-mentioned, Mr. Horne's Defence was, that the Troops *had* been guilty of Murder. Mr. Attorney General *Thurlow* in reply, addressing himself to the Jury, said, "Gentlemen, The *Matter of the Libel* is this." He then stated the Advertisement, and said, "Let us see what is the Nature of the Ob-
 "servation he" (Mr. Horne) "makes upon
 "it: in the first Place, he says, that I left it
 "exceedingly short; and the Objection to
 "my having left it short was simply this,
 "that I had stated no more to you but this,
 "that the Libel imputed to the Conduct of
 "the King's Troops the Crime of Murder;

" I stated it as imputing it to the Troops,
 " ordered as they were upon the Public Ser-
 " vice, and imputing to that Service the
 " Crime and Qualification of Murder, was
 " an Expression scandalous and seditious in
 " itself, reflecting highly upon those Troops;
 " reflecting highly upon the Conduct of
 " them; reflecting upon them *to all the Pur-*
 " *poses and Conclusions this Information states;*
 " but it seems I did not argue it sufficiently;
 " I confess very fairly, that to argue such
 " Propositions as those according to that
 " Gentleman's Notions of arguing them suf-
 " ficiently, is far beyond all the Compass,
 " all the Talents, and all the Abilities that I
 " have in the World; *I cannot speak four*
 " *Hours, in order to demonstrate to You, that*
 " taxing People with the Crime of Murder,
 " and taxing the Conduct of those People
 " with that Imputation, is a *scandalous Label*
 " upon those meant to be reflected upon. If
 " there be a Man, a Professor of Language,
 " of

" of better Talents than myself, who can
 " expend four or five Hours upon enlarging
 " those Matters, I don't envy him, or his
 " Abilities; if I did, my Lungs would not
 " even go through it; but I trust I have suf-
 " ficiently *demonstrated that Proposition.*
 " Now, upon the other side, what is the
 " Kind of Answer that is made to this? To
 " prove that it *was* Murder, asserting that it
 " *was* Murder over and over again in the
 " Speech, as a Palliation and Defence of the
 " *Libel*; but he says he is to prove that it
 " *was* Murder." And again, " I will never,
 " so long as I live, accede to this *as a Propo-*
 " *sition of Law*, that a Man shall be at Liber-
 " ty, *in a Libel*, to charge you with the
 " Crime of Murder, and when indicted for
 " that *Libel*, or otherwise brought into Judg-
 " ment for it before the Court, he shall put
 " you to prove it *not* Murder; I never heard
 " of such a Proposition ever being used in
 " any Place under Heaven; there is not a
 " *Maxim*

"*Maxim of Law* to be fetched from any
 "Country, or of any Age like it."

The Attorney General having thus addressed the Jury upon the *Point of Law*, is a *direct Admission* on his Part, that *the Jury was competent to decide it*. But it is said, that the *Jury*, in case of a Libel, when the whole of it is upon the Record, *has no more to do with the Decision of the Law, than the By-standers in the Court-house*.—For the Sake of Argument, be it so. Suppose then, that that Attorney General had addressed *this identical Speech about Law*, not to the Jury; but to those, who according to this new-fangled Doctrine, had as much to do with the *Point of Law* as the Jury had; namely, to the *By-standers* in the Court-house. What would any body, in *that Case*, have thought of this learned Attorney General?—Yet, in what Respect would it have been *more absurd* for him to have addressed this Speech about *Law* to the *By-standers*; than to have addressed

addressed it (as he did) to the *Jury*, who, according to this strange Supposition, had *no more Right* to decide upon *Matter of Law*, than the Gentlemen and Ladies who were present at the Trial, or than the *Mob in the Street*? Under the absurd and preposterous Supposition, that “*the Province of the Jury is only to try FACTS*,” his Conduct was wild and extravagant.

But knowing him to be a Man of a strong Understanding, and of the greatest Ability, I must, of course, endeavour to reconcile his Conduct, at least with *Common Sense*; and I must therefore suppose, that he addressed the Jury about *Law* in the Case of the King against Horne, *because he knew* that it was within their Province to decide upon *Matter of Law*, upon the General Issue or Plea of *Not Guilty*; as well as to decide upon *Matter of Fact*. He therefore acted *wisely* and *judiciously* in addressing the Jury in the Manner, that he did. In answer to this, it may possibly be said, that

that the then Attorney General acted only as *Counsel*, in the Case of the King against Horne; and therefore, that it is unfair to urge what a Man says as a *Counsel*, as an Argument upon this Subject. But I do not so urge it (although I do not admit, that an Attorney General prosecuting a Man *ex Officio* ought to be considered merely as a *Counsel*); I do not consider *what* he said when he argued the *Point of Law* before the Jury; nor whether his Positions were right or wrong; nor whether his Arguments were good or bad; but the *only* Point I mean to urge is, that in whatever Manner he may have argued the *Point of Law*, his having argued it *at all* before the Jury, is a *clear Proof* that he deemed them *competent* to decide it.

Mr. Attorney General Pratt (now Earl Camden), and Mr. Attorney General De Grey (afterwards Lord Chief Justice of the Common Pleas), pursued the same constitutional Line of Conduct, when they respectively prosecuted

secuted Dr. Shebbeare and Mr. Woodfall; as Mr. Attorney General *Thurlow* did in the Case of the *King against Horne*.

In short, it is an established Practice, that the Question of the *Criminality or Innocence* of a Defendant, is argued before the *Jury*; and that, as well in the Case of *Libel*, as in *all* other Cases.

But some Persons have a most curious System upon this Subject. They hold in the first Place, that “*the Jury is ONLY to try*” “*FACTS.*” Therefore Arguments respecting *Law* (according to them) are improperly addressed to the *Jury*. One should suppose, that those Persons therefore think, that those Arguments of Counsel about *Law* are intended for the *Judge who presides* at the Trial. No, by no Means: for, those *same* Persons are of Opinion also, that it is *not* for a single Judge, sitting at *Nisi Prius*, “*to discuss*” “*the Nature of a Libel,*” nor to “*comment*” thereupon. The *Judge*, therefore (upon
T those

those Principles), *has no more to do with Law*, whilst he is sitting as a single Judge at *Nisi Prius*, than the Jury has. And therefore, those Arguments about *Law* are intended neither for *Judge* nor *Jury*!

Consequently, all the *learned Arguments* of Counsel at the Trial (according to the extraordinary Opinion of these Men) are by the Law, *intended* only to be *wasted in Air*, or else are *intended* for the Consideration and Information of the Judges in *Westminster Hall*, who are *not even present* at the Discussion!

Another singular Argument has been used upon this Subject; namely, that the Words "*against the Peace of the King*," in an Indictment or Information for a *Libel*, are mere Words of Form, like the Words "*moved and seduced by the Instigation of the Devil*." And therefore, that a Jury may *convict* a Defendant, although it may *not* appear to them

that

that the Paper published is "*against the Peace.*"

Whereas, Lord Hale in his History of the Pleas of the Crown†, says, that "An Indictment, without concluding *against the Peace*, is insufficient." Therefore, the Words *against the Peace*," are not *Words of Form*; but are an *essential Part* of an Indictment.

On the contrary, the Words "*not having God before his Eyes, but being moved and seduced by the Instigation of the Devil*," are mere *Words of Form*; and Burn††, speaking of those Words, says, "I do not find it asserted by *any Authority*, that *these Words* are necessary in an Indictment."

† Vol. II. p. 188.

†† See Burn's Justice, Article Indictment, Vol. II. p. 570, 15th Edit.

Consequently, a Jury, in considering what Verdict they shall give, are *not* to attend to these mere *Words of Form*; but, they are bound to take into their Consideration those *essential Words*, "*against the Peace.*"

Judge Blackstone † lays it down, that, in order for a Paper to be a *Libel*, it must tend to "*the Breach of the Peace.*"

The

† In Blackstone's Commentaries, Vol. III. p. 124, 125, and 126, 8th Edition, it is said, "*Mere Scurrility, or opprobrious Words, which neither in themselves import, nor are in Fact attended with any injurious Effects, will not support an Action.*" So Scandals, which concern "*Matters merely Spiritual, as to call a Man Heretic or Adulterer, are cognizable only in the Ecclesiastical Court; unless any temporal Damage ensues, which may be a Foundation for a per quod.*" Words of Heat and Passion, as to call a Man "*Rogue and Rascal, if productive of no ill Consequence*"

The present Chief Justice of the Common Pleas has maintained, with great Strength of Argument, that *speculative* Writings upon Government are *not Libels*.

The

“ quence, and not of any of the dangerous Species,
 “ before mentioned, *are not actionable*: neither are
 “ Words spoken in a *friendly Manner*, as by Way
 “ of Advice, Admonition, or Concern, without
 “ any Tincture or Circumstance of Ill-will:
 “ for, in both these Cases, they are not *maliciously*
 “ spoken, which is Part of the Definition of *Slan-*
 “ *der*. Neither are any reflecting Words made
 “ Use of in *legal* Proceedings, and pertinent to the
 “ Cause in Hand, a sufficient Cause of Action for
 “ Slander. Also, if the Defendant be able to
 “ justify, and prove the Words to be *true*, no Ac-
 “ tion will lie, even though Special Damage hath
 “ ensued: for *then*, it is *no Slander or false Tale*.
 “ As if I can prove the Tradesman a Bankrupt,
 “ the Physician a Quack, the Lawyer a Knave,
 “ and the Divine a Heretic; *this will destroy their*
 “ re-

The Thing that is illegal, is the *exciting* any one to *Sedition*, or to a *Breach of the Peace*. The Question therefore, upon a Libel is, whether the Paper published *did thus*

“respective Actions.” And again, *“With regard to Libels in general, there are, as in many other Cases, two Remedies; one by Indictment, and another by Action. The former, for the PUBLIC Offence; for, every LIBEL has a Tendency to the BREACH OF THE PEACE, by provoking the Person libelled to break it: which Offence is the same (in Point of Law) whether the Matter contained be true or false; and therefore, the Defendant, on an Indictment for publishing a Libel, is not allowed to alledge the Truth of it by Way of Justification. But, in the Remedy by Action, on the Case, which is to repair the Party in Damages for the Injury done him; the Defendant may, as for Words spoken, justify the Truth of the Facts, and shew that the Plaintiff has received no Injury at all.”*

excite,

excite, AND was *so intended*. Consequently mere *speculative* Writings on the *Constitution* are *not Libels*, however *absurd* they may be. Suppose, for Instance, that a Man were to write a *speculative* Work, to prove that a Trial by a single Judge would be far preferable to the Trial by Jury; or that a Parliament, composed only of a King and House of Peers, would be beyond Comparison better than a Legislature of King, Lords, and Commons. No Man could possibly reprobate such a Work more than I should: but if the Work did *not* excite the People to Sedition, such a *speculative Publication* could certainly never be deemed a *Libel*: for, *Absurdity* is no Part of the *Definition of a Libel*.

If our *boasted* Liberty of the Press were to consist only in the Liberty to write *in praise* of the Constitution; *that* is a Liberty enjoyed under many *arbitrary* Governments. I suppose it would not be deemed quite an *unpardonable* Offence even by the *Empress of Russia*,

if

if any Man were to take it into his Head to write a Panegyric upon the *Russian Form of Government*. Such a Liberty as *that* might therefore properly be termed the RUSSIAN LIBERTY OF THE PRESS. But, the *English Liberty of the Press* is of a very different Description; for, by the Law of England, it is *not* prohibited to publish *speculative Works* upon the Constitution, whether they contain Praise or Censure.

The *Liberty of the Press* is of *inestimable* value; for, without it, this Nation might soon be as thoroughly *enslaved* as *France* was, or as *Turkey* is. Every Man who detests the *old Government of France*, and the *present Government of Turkey*, must be therefore, earnest to secure that *Palladium* of Liberty; and must also be anxious to preserve to the People, inviolate, the *Trial by Jury*, that transcendent, that incomparable and *guardian* Right.

Various

Various *Reasons* have been assigned, why Mr. Fox's Bill ought *not* to have passed into a Law.

1st, " Because the Rule laid down by the
 " Bill, contrary to the unanimous Opi-
 " nion of the Judges, and the *unva-*
 " *ried Practice of Ages*, subverts a fun-
 " damental and important Principle
 " of English Jurisprudence; which
 " leaving to the Jury the Trial of the
 " Fact, reserves to the Court the Deci-
 " sion of the Law. It was truly said
 " by Lord Hardwicke, in the Court of
 " King's Bench, that if ever these
 " come to be confounded, it will prove
 " the Confusion and Destruction of the
 " Law of England.

2dly, " Because Juries can in no Case decide
 " whether the Matter of a Record be
 " sufficient, upon which to found a
 " Judgment. The Bill admits the Cri-
 " minality of the Writing set forth in

" the Indictment, or Information, to
 " be Matter of Law, whereupon Judge-
 " ment may be arrested, notwithstand-
 " ing the Jury have found the Defend-
 " ant Guilty. This shews *that the*
 " *Question is upon the Record, and dis-*
 " *tinctly separated from the Province*
 " *of the Jury, which is ONLY to try*
 " FACTS.

3dly, " Because by confining the Rule, to an
 " Indictment or Information for a Li-
 " bel, it is admitted that it does not ap-
 " ply to the Trial of the General Issue
 " in an Action for the same Libel, or
 " any Sort of Action, or any other Sort of
 " Indictment or Information. But as
 " the same Principle and the same
 " Rule must apply to all General Issues,
 " or to none, the Rule, as declared
 " by the Bill, is manifestly errone-
 " ous."

These

These Reasons have certainly not the Demerit of perplexing the Subject by any artful Sophistries, nor of rendering it obscure in Depth of Law. Every one almost can perceive their Fallacy. Few Observations only need therefore be made upon them.

It is rather singular, that amongst *all* those Reasons, there should not be *one* that is not founded on a Mistake.

From the Cases already cited, it clearly appears, that it has *not* been "*the unvaried Practice of Ages,*" to leave to the *Jury the Trial of the Fact*, and to reserve to the *Court the Decision of the Law*.

It is equally clear, that it is a Mistake to say, that "*Juries can in no Case decide, whether the Matter of a Record be sufficient upon which to found a Judgment.*" For if, from a Blunder, a Man were to be charged in an Indictment, with having *burglariously* broken open an House in the *Day-Time*, and if the Judge at the Trial did *not*

observe the Blunder, (for, House-breaking is not *Burglary*, unless committed in the *Night-Time*;) will it be said, that the Jury could not acquit the Defendant, on Account of the palpable *Insufficiency* of so absurd an Indictment?

It is evidently another Mistake to say, that, "The Bill *admits* the *Criminality* of *the Writing* set forth in the Indictment or Information to be *Matter of Law*;" for, Mr. Fox's Bill contains no such Admission. The *Definition* of a Crime, and also the *technical* Manner of *charging* it in an Indictment or Information, are clearly *Matters of Law*; and when, by a Motion in *Arrest of Judgment*, any such Point of *Law* is brought NAKEDLY before the Court, the Court, no Doubt, has a Right to decide thereon. But the *Criminality* or *Innocence* of a PERSON accused of a Crime (not to use the *inaccurate* Expression of the "*Criminality of the Writing*",) is NOT mere *Matter of Law*; but it is, in the very Nature of Things, a *complex*

plex Question of Law and Fact. And although there be, in that **COMPLEX QUESTION**, a *Point of Law*, which, upon a Motion in Arrest of Judgment, may come before, and be decided by the *Court*; yet nevertheless, at the *Trial*, the *Whole* of that *complex-Question of Law and Fact* is before the *Jury*, and must, as Lord Chief Justice *Vaughan** properly maintains, be *resolved* and *determined* by them. For the Law has wisely provided (as has been already said) *different GUARDS* to prevent an *unjust* Judgment from being pronounced against any Defendant.

It appears to me, that the Arguments of those who opposed Mr. Fox's Bill, have been grounded upon this most wretched *Fal- lacy*; namely, that the *Point of Law* (in Cases where no Writ of Error is brought) is

* See Lord Chief Justice Vaughan's Reports, p. 150.

to be determined upon *only* ONCE: and that, as it *may* be determined by the *Court* upon a Motion in Arrest of Judgment, it ought never therefore to be determined by the *Jury*!

As well might they say, that *no Court in Westminster Hall* has any Right to decide upon *any Point of Law*, because that very *Point of Law* may afterwards be determined by the *House of Lords*!

I have now been speaking of the Case of *Conviction*; for, I have already shewn, that the Decision of the Jury is (and ought to be) *final* in the Case of *Acquittal*.

The next Proposition, videlicet, "*that the Question is upon the RECORD, and distinctly separated from the Province of the Jury, which is ONLY to try FACTS,*" contains *two Mistakes*; as has been sufficiently proved already.

In the famous Case of the *Seven Bishops*, who were tried for publishing a Libel; before
fore

fore the Jury went out of Court to consider of their Verdict, they desired to have the Papers that had been given in Evidence; upon which Lord Chief Justice Wright said, "*The Statute Book they shall have**." Did the Chief Justice order the STATUTE BOOK to be given to the Jury in order to enable them to try FACTS?

It is further said, that "*by confining the Rule to an Indictment or Information for a Libel, it is ADMITTED that it does not apply to the Trial of the General Issue in an Action for the same Libel, or any Sort of Action, or any other Sort of Indictment or Information.*" No such Thing is admitted by Mr. Fox's Bill, nor was it ever admitted to my Knowledge any where: but directly the contrary has been strenuously contended. Now, let it be observed, that this is not a

* See State Trials, Vol. IV. 3d Edit.

Bill to *alter* the Law; for if it were so, it would be true, that as it only mentions an *Indictment or Information for a Libel*, its Operation would extend no further. But the Bill is a *Declaratory Bill to condemn a Species of Direction* which the Legislature has deemed to be *illegal*. The Bill, therefore, *reprobates* the very PRINCIPLE upon which that *Species of Direction* is founded; and consequently the Bill *condemns, as illegal*, that Species of Direction in *all Cases*.

In the Act † of the 16th Charles I. (Chap. xiv. §. 2.) it is “ *declared and enacted*, that
 “ the Charge imposed upon the Subject, for
 “ the providing and furnishing of Ships, com-
 “ monly called Ship-money, is contrary to, and

† It is by this Act, that the *extra-judicial Opinion of the Justices and Barons*, respecting Ship-Money, and the *Judgment* given by the greater Part of the *Judges* against *John Hampden*, were declared to be *illegal*.

“ against

“ against the Laws and Statutes of this
 “ Realm.” Now it might just as well be
 said, that, as that *Declaratory Act* is *confined*
 to *Ship-Money*, it is therefore ADMITTED
 thereby, that it *is legal* for the King to *levy*
Money in *all other Cases* without the Consent
 of Parliament!

The opposers of Mr. Fox's Bill, in re-
 spect to *Authorities of Law* seem to be sur-
 rounded with Dearth and Famine: it is no
 wonder therefore, that the *above-said Reasons*
 against that Bill, should be attempted to be
 bolstered up with what is *supposed* to have
 been said by Lord Hardwicke in the Court of
 King's Bench. The above-mentioned Words
 which are quoted as Lord Hardwicke's, are
 reported in the Case of the *King against Poole*.
 It is said to have been a Motion for a
 “ New Trial, on an Information in the Na-
 “ ture of a *Quo Warranto* against the De-
 “ fendant to shew by what Authority he acted

“ as Mayor of Liverpool, for that the Verdict was found on the Matter of Law against the Direction of the Judge; the Judge at last ORDERED the Jury to find it *specialy*, but they brought in a *General Verdict* †.”

Lord Hardwicke is reported to have said †† that, “ when the Judge upon a Doubt of Law, directs the Jury to bring in the Matter *specialy*, and they find a *General Verdict*, that is a *sufficient Foundation* for a new Trial.” And also ††† that, “ for any Thing that can appear to a Su-

† See Cases argued and adjudged in the Court of King's Bench, in the 7th, 8th, 9th and 10th Years of King George the Second, in the Time of Lord Chief Justice Hardwicke, from p. 23, to p. 28.

†† Page 26.

††† Page 28.

“ *perior*

"*perior Court, the Jury might have found
 "their Verdict on this, that the Defendant
 "had not the Majority of Votes."* And
 a new Trial was granted.

This Case is reported by an *Anonymous*
 Writer, and bears every Mark of a *spurious*
 Composition; or at least, of an *inaccurate* Re-
 port. For, who ever heard of a "*Judge*
 "**ORDERING** a Jury" what *Verdict* they
 should give?

One may apply to *this* Case so reported the
 Words of *Hamlet*;

- "Be thou a Spirit of Health, or *Goblin* dam'd;
- "Bring with thee Airs from Heaven, or *Blasts* from Hell;
- "Be thy Intents *wicked* or charitable,
- "Thou com'st in such a **QUESTIONABLE** Shape,
- "That I will speak to thee."

It cannot be, that Lord Hardwicke, in
 the Teeth of such Authorities as Littleton,
 Coke, Hale, Vaughan, Holt, &c. should ever

have laid it down as a *Principle*, that a Judge should always have it in his Power to take from a JURY their unquestionable Right of giving a GENERAL Verdict, by ORDERING them to find *pecially*. It would have been as flagrant a *Violation* of the Laws and Constitution, as was committed when the Charter of the City of London was violently and illegally taken away by the Court of King's Bench †, in the Reign of King Charles the Second; and as to the Consequences to the Public, they would be infinitely worse. And it would have been the more violent, as it is stated in the Report, that “*for any Thing that appeared to the Court the Jury might have found their Verdict*” on a Matter of

† By the Act of the 2d of William and Mary, Session 1st, Chap. viii. § 2, that Judgment of the Court of King's Bench, is declared to be *illegal and arbitrary*, and is declared and enacted to be reversed, annulled, and made void.

FACT;

FACT; namely, "*that the Defendant had not the Majority of Votes.*" And nothing is reported to have appeared to the Court, that the Jury were *mistaken* as to the *Fact*. And therefore, although the Jury *might* have found their *Verdict* upon a FACT; and, for any Thing that *appeared* to the Court, might have been *perfectly* RIGHT in so finding; yet, the *Verdict* was set aside, because they did not obey the ORDER of the Judge, which was to find *especially*.

It is therefore, much more natural to suppose, that *this Case* is *inaccurately* reported by the *anonymous* Reporter, than to suppose that Lord Hardwicke and the Court of King's Bench *did* act in a Manner so *violent* and *un-constitutional*. Yet, such is the Case which is relied on by the Opposers of Mr. Fox's salutary Bill; and for want of better Authority, it has been quoted *over and over* again by them!

When *such Principles* as those above stated, respect-

respecting *Juries, Libels, and GENERAL VERDICTS*, are not only treated with Respect, but are held forth as Objects of Veneration; it is indeed high Time for Members of the Legislature to be *vigilant*, and for the *People* themselves to be **UPON THE WATCH**.

One cannot see such a Case as that above mentioned, attempted to be set up in this country as an Authority of Law, without admiring the Advice of a celebrated Writer†, in his Dedication to the *English Nation*; “Let me exhort and conjure “you” (says he) “*never* to suffer an *Invasion* “of your political Constitution, to pass by, “without a *determined, persevering Resistance*. “One Precedent creates another.—They soon “accumulate, and constitute Law. What “Yesterday was Fact, To-day is Doctrine. “Examples are supposed to justify the most “*dangerous Measures*; and where they do not

† Junius.

“sunt

“sult exactly, the Defect is supplied by Ana-
 “logy.—Be assured, that the Laws, which
 “protect us in our civil Rights, grow out
 “of the Constitution, and that they must
 “fall or flourish with it. This is not the
 “Cause of Faction, or of Party, or of any
 “Individual, but the *common Interest* of every
 “Man in Britain.”

I know I shall be asked, why I am so
 exceedingly *anxious* upon this Subject. It
 will be said, *Are our present Judges not*
learned, are they not honest, and respectable,
what then have we to fear? It is with great
 Satisfaction that I admit, that our *present*
 Judges are of that Description. But let us
 recollect the *Reason* why they are so. So
 long as the Judges are confined by Law (to
 use the Expression of a learned and venerable
 Earl†) to the giving “*their Advice to Ju-*
 “*ries both as to Law and Fact,*” so long will
 the Judges be respectable. But if ever that

† Earl Camden.

sacred Principle of the Law of England should be subverted, and if the Time should ever come, when the Power of *Juries* shall be destroyed, and when the Characters, the Lives, the Liberties, and Properties of the People shall be at the *Disposal of Judges* appointed by the Crown; from that Moment it becomes the Interest of any *corrupt* Minister who hereafter may arise, to appoint for Judges, his most violent Partizans, and those who would go the greatest Lengths to support his flagitious Government. We might then have again placed upon the Bench, such Men as *Judge Jefferies* himself; if, in the present Age, *such* Men could possibly be found.

It has been truly said by a learned Author†, that “ Trials by Juries have been used in
“ this Nation Time out of Mind, and were

† *Trial per Pais*, Page 3, by Giles Duncomb of the Inner Temple.

“ con-

“ contemporary and coeval with the first ci-
 “ vil Government thereof, and Administration
 “ of Justice ; for, amongst the first Inhabit-
 “ ants the *Britons*, the Freeholders were used
 “ in all Trials. And Trial by Jury was
 “ practised by the *Saxons*, continued by the
 “ *Normans*, and confirmed by *Magna Charta*;
 “ and was ever so esteemed and prized in this
 “ Island, that no Conquest, no Change of
 “ Government ever prevailed to alter it.”

Far otherwise has it been, with respect to
 every *other* Part of our Constitution. Cor-
 ruption has, in former Times, pervaded the
House of Commons ; and the undue Influence
 of the Crown, in those Times, has even crept
 into the *House of Lords*. Previously to the
 happy *Æra* of the Revolution in the last
 Century, we have had Tyrants upon the
Throne ; such as the bloody Richard the
 Third, the cruel Henry the Eighth, the three
 first Kings of the Stuart Family, and that

English Tarquin King James the Second. We have had in our *Courts of Justice*, such execrable Men as the Ship-money Judges of King Charles, and the dispensing Judges of King James. We have even had upon the Bench such Monsters as *Scroggs* and *Jefferies*, whose very Names no honest Man can hear without Horror and Indignation. Our *Habeas Corpus*, that second *Magna Charta*, has sometimes been suspended by Act of Parliament. The People have been *disarmed* by an undue Stretch of the Prerogative, which flagrant Violation of the Constitution was afterwards pointedly reprobated in the Declaration and Bill of Rights. Even the very Essence of Freedom in this Country has been attempted to be destroyed, by that most violent and alarming of all Measures, the licensing Act of King Charles the Second, which totally destroyed, for a Time, the *Liberty of the Press*. In short, at some Period or other of our History,

every

every Thing valuable, every Thing important, in our Form of Government, has been either annihilated or rendered useless; and every Rampart against Tyranny, every Defence of our Rights, and all the Out-works of the Constitution, have suffered a temporary Overthrow, by the violent Efforts, or artful Designs, of the Enemies of public Freedom.

One *Citadel* however, has withstood the Siege. One important Fort has alone successfully resisted the Attacks that have been made upon it: it has resisted for ages; it has neither been destroyed by Sap, nor taken by Storm.— If therefore, we are still a *free* Nation; if this Kingdom is the richest, and the most prosperous Country that at this Moment exists in Europe; we owe it to that strong Hold, and *Fortress of the People*, to that impregnable GIBRALTAR of the English Constitution, the TRIAL BY JURY. *This* is that invaluable *Bulwark of Liberty*, which Parliament
has

has lately protected, and will I trust ever
continue to protect: at least I shall con-
sider it as one of my most essential Duties,
to defend it steadily to the last Hour of
my Life,



F I N I S.

